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Sup. Ct

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943 44

No. 490 13

ANTHONY CRAMER, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1943
CERTIORARI GRANTED NOVEMBER 8, 1943

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 406

ANTHONY CRAMER, PETITIONER

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THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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a In the United States District Court, Southern District of New York

UNITED STATES OF AMERICA

vs.

ANTHONY CRAMER

Statement under Rule 13

Filed March 22, 1943

The indictment was filed on August 31st, 1942, against Anthony Cramer alleging violation of Section 1, Title 18 U. S. Code. The defendant was arraigned before Hon. John C. Knox, U. S. D. J., on August 31st, 1942, was held in $50,000 bail and was remanded. On September 4th, 1942, the defendant pleaded not guilty before Hon. Blake Kennedy, U. S. D. J., and was remanded.

The trial was commenced before Hon. Henry W. Goddard, U. S. D. J., and a jury on November 9th, 1942, and was continued on November 10th, 12th, 13th, 16th, and 17th, 1942. The defendant was convicted on November 18th, 1942. The defendant was sentenced to forty-five years imprisonment and was fined $10,000.

A notice of appeal was filed on December 3rd, 1942.

b [File endorsement omitted.]

c In the District Court of the United States for the Southern District of New York

* * * * *

Indictment

Filed Aug. 31, 1942

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That Anthony Cramer, the defendant herein, at the City, County, State, and Southern District of New York and within the jurisdiction of this Court, continuously and at all times from June 17, 1942, up to and including July 17, 1942, under the circumstances and conditions and in the manner and by the means here-

inafter set forth, then and there being a citizen of the United States and a person owing allegiance to the United States, in violation of his said duty of allegiance, unlawfully, feloniously, traitorously, and treasonably did adhere to the enemies of the United States, to wit, to the Government of the German Reich, its counsellors, armies, navies, secret agents, spies, representatives, and subjects, with which the United States at all times since December 11, 1941, have been at war, giving to said enemies aid and comfort within the United States and elsewhere, that is to say:

On or about June 17, 1942, one Werner Thiel, alias William Thomas, hereinafter referred to as Werner Thiel, and one Edward John Kerling, alias Edward John Kelly, alias Keller, hereinafter referred to as Edward John Kerling, representatives and subjects of the Government of the German Reich, and enemies of the United States, came into the United States for the purpose of executing a mission entrusted to them by the Government of the German Reich in the furthering and carrying on of its war against the United States, and for a period of time thereafter up to August 8, 1942, in the execution of said mission, served the Government of the German Reich as, and acted as, secret agents and spies and secret representatives.

The said mission of Werner Thiel and Edward John Kerling throughout said period of time insofar as the character of the same is known to the said Grand Jurors included the destruction of certain war materials, premises, and utilities of the United States, the receipt of money from the Government of the German Reich and the disbursement of such money in connection with the procurement, manufacture, and use of explosive substances and sabotage devices, and the recruiting and hiring of persons, whose names are to the Grand Jurors unknown, to engage in unlawful hostile enterprises in connection with the use of said explosive substances and sabotage devices in the destruction of the war materials, premises, and utilities of the United States.

The said mission of Werner Thiel and Edward John Kerling throughout said period of time also included the securing of information concerning the national defense of the United States and concerning the attitude of its subjects and citizens towards said war and towards the said Government of the German Reich, and transmitting such information from time to time to the Government of the German Reich, to assist said Government in carrying on its said war with the Government of the United States, and the employment of other persons, to said Grand Jurors unknown, to secure such information for them, the said Werner Thiel and Edward John Kerling, and to secure for, and transmit such in-

formation to, said Government of the German Reich for the purpose aforesaid.

e The said mission of Werner Thiel and Edward John Kerling throughout said period of time also included the making and conveying of false statements and reports within the United States with intent to interfere with the operation and success of the military and naval forces of the United States to the advantage of the Government of the German Reich in carrying on its said war with the Government of the United States, and the employment of other persons, to said Grand Jurors unknown, to make and convey such false statements and reports for the purpose aforesaid.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that Anthony Cramer, the defendant herein, has been a resident of the United States since 1925 and a citizen thereof since the year 1936, and that the said adherence of Anthony Cramer, the defendant herein, to the Government of the German Reich, its counsellors, armies, navies, secret agents, spies, representatives, and subjects, and the said giving of aid and comfort by Anthony Cramer to the same, enemies of the United States, consisted throughout said period of time, that is, the time from June 17, 1942, to July 17, 1942, in his receiving, harboring, relieving, assisting, and treating with the said Werner Thiel and Edward John Kerling, enemies of the United States, as aforesaid; in his aiding, abetting, advising, and counseling Werner Thiel and Edward John Kerling concerning said mission of Werner Thiel and Edward John Kerling on behalf of the Government of the German Reich; in his countenancing the activities of Werner Thiel and Edward John Kerling in furtherance of said mission; in his receiving, possessing, transferring, holding, carrying, safeguarding, and concealing property and funds of the said Werner Thiel with the intent and purpose that the said property and funds should be used by Werner Thiel in furtherance of his aforesaid mission on behalf of the Government of the German Reich;

f in his carrying out requests and instructions of the said Werner Thiel and endeavoring in pursuance thereof to establish contact and communication between Werner Thiel and other persons residing in the United States who would or might be favorably disposed to give aid and comfort to the said Werner Thiel; in his giving to officers, agents, and employees of the United States false information known to him to be false regarding the said Werner Thiel and Edward John Kerling with intent to conceal their identity and purpose and their activities in the United States, and to conceal the fact that said Werner Thiel and Edward John Kerling were secret agents, spies, and secret representa-

tives of the Government of the German Reich; he, the said Anthony Cramer, when so adhering and giving aid and comfort to the enemies of the United States, that is, the Government of the German Reich, its counsellors, armies, navies, secret agents, spies, representatives, and subjects, well knowing that the said Werner Thiel and Edward John Kerling were enemies of the United States, secret agents, spies, and secret representatives of the Government of the German Reich and had come to the United States and were here present in the United States for the purpose of executing a mission on behalf of said Government of the German Reich in the furthering and carrying on of its war against the United States.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that in the prosecution, performance, and execution of said treason and of said unlawful traitorous and treasonable adhering and giving aid and comfort to the enemies of the United States, Anthony Cramer, the defendant herein, at the several times hereinafter set forth in the specification thereof (being times when said United States were at war with the Government of the German Reich as aforesaid), unlawfully, feloniously, traitorously, and treasonably did do, perform, and commit certain overt acts, that is to say:

g 1. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did meet with Werner Thiel and Edward John Kerling, enemies of the United States, at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City and State of New York, and did confer, treat, and counsel with said Werner Thiel and Edward John Kerling for a period of time for the purpose of giving and with intent to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling.

2. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues, both in the City and State of New York, for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

3. Anthony Cramer, the defendant herein, on or about June 24, 1942, and continuing up to and including June 29, 1942, at the Southern District of New York and within the jurisdiction of this Court, did carry into his residence at 171 East 83rd Street, in the City and State of New York, and there possess, conceal,

hold, and have for safekeeping a money belt received from Werner Thiel, an enemy of the United States, for the purpose of complying with instructions of Werner Thiel that he should hold said money belt in safekeeping, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

4. Anthony Cramer, the defendant herein, on or about June 24, 1942, and continuing up to and including June 29, 1942, at the Southern District of New York and within the jurisdiction of this Court, did carry into his residence at 171 East 83rd Street, in the City and State of New York, and there possess, conceal, hold, and have for safekeeping a sum of money, to wit, approximately $160, received from Werner Thiel, an enemy of the United States, for the purpose of complying with instructions of Werner Thiel that he should hold said money in safekeeping, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

5. Anthony Cramer, the defendant herein, on or about June 24, 1942, at the Southern District of New York and within the jurisdiction of this Court, wrote a letter addressed to Miss Norma Kopp at Westport, Connecticut, for the purpose of complying with instructions of Werner Thiel, an enemy of the United States, that he should establish communication and contact between said Werner Thiel and Emma Franziska Kopp, also known as Norma Kopp, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

6. Anthony Cramer, the defendant herein, on or about June 25, 1942, at the Southern District of New York and within the jurisdiction of this Court, went from his residence at 171 East 83rd Street, in the City and State of New York, to the Corn Exchange Bank Trust Company, at 126 East 86th Street, in the City and State of New York, carrying a large sum of money, to wit, approximately $3,500 received from Werner Thiel, an enemy of the United States, for the purpose of placing said money in a safe deposit box and there holding it for safekeeping, and for the purpose of complying with instructions of the said Werner Thiel that he should hold said money in safekeeping, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

7. Anthony Cramer, the defendant herein, on or about June 25, 1942, and continuing up to and including June 29, 1942, in the Southern District of New York and within the jurisdiction of this Court, did place a large sum of money, to wit, approximately $3,500, received from Werner Thiel, an enemy of the United States, in a safe deposit box in the Corn Exchange Bank Trust Company, 126 East 86th Street, in the City and State of New York, and did there

possess, conceal, hold, and have for safe-keeping said money; for the purpose of complying with instructions of Werner Thiel that he should hold said money in safekeeping, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

8. Anthony Cramer, the defendant herein, on or about June 27, 1942, at the Southern District of New York and within the jurisdiction of this Court, left a note for Werner Thiel, an enemy of the United States, at the Commodore Hotel, Lexington Avenue and 42nd Street, in the City and State of New York, in substance requesting said Werner Thiel to get in touch with him for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

9. Anthony Cramer, the defendant herein, on or about June 27, 1942, at the Southern District of New York and within the jurisdiction of this Court, accompanied Emma Franziska Kopp, also known as Norma Kopp, from his residence at 171 East 83rd Street, to Thompson's Cafeteria, Lexington Avenue and 42nd Street, both in the City and State of New York, for the purpose of complying with instructions of Werner Thiel, an enemy of the United States, that he should establish communication and contact between the said Emma Deanziska Kopp, also known as Norma Kopp, and Werner Thiel, and for the purpose of giving and with intent to give aid and comfort to the said Werner Thiel.

10. Anthony Cramer, the defendant herein, on or about June 27, 1942, at the Southern District of New York and within the jurisdiction of this Court, did give false information and make false statements regarding Werner Thiel, an enemy of the United States, to officers and agents of the United States, to wit, John G. Willis and A. E. Ostholthoff, Special Agents of the Federal Bureau of Investigation, Department of Justice, then and there engaged for and on behalf of the United States in investigating said Werner Thiel and his activities in the United States, said false information and false statements being in substance as follows, to wit: (1) That Werner Thiel's name was "Bill Thomas"; (2) That from March 1941, until June 1942, Werner Thiel had been working in a factory on the West Coast of the United States; (3) That during the aforesaid period, Werner Thiel had not been out of the United States; (4) That the money belt given him by Werner Thiel in June 1942, had contained only a couple of hundred dollars which Werner Thiel had owed him; (5) That $3,500 in his safe deposit box at the Corn Exchange Bank Trust Company, 86th Street Branch, belonged to him and to no one else, had been obtained by him from the sale of his securities, and was kept by him in a safe deposit box because he considered it safer there—

than in his savings account at said bank; the aforesaid false information and false statements being given and made for the purpose of concealing the identity and mission of said enemy, Werner Thiel, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

Contrary to the said Anthony Cramer's duty of allegiance to the United States and to the form of the statute of the same in such case made and provided, and against the peace and dignity of the United States (Section 1, United States Criminal Code).

United States Attorney.

In United States District Court, Southern District of New York

Cr. 113–12

UNITED STATES OF AMERICA

vs.

ANTHONY CRAMER

Bill of exceptions

Before Hon. HENRY W. GODDARD, D. J., and a Jury

NEW YORK,
November 9, 1942, 10:30 a. m.

Appearances

Mathias F. Correa, Esq., United States Attorney, for the Government: Mathias F. Correa, Esq., Richard J. Burke, Esq., Assistant U. S. Attorney, and Louis W. Goodkind, Esq., Assistant U. S. Attorney, of Counsel. Harold R. Medina, Esq., and John McKim Minton, Jr., Esq., Attorneys for Defendant: Harold R. Medina, Esq., John McKim Minton, Jr., Esq., and John J. Jordon, Esq., of Counsel.

(A jury was duly impaneled and sworn. Two alternate jurors impaneled and sworn.)

(Recess until 2:30 p. m.)

2 AFTERNOON SESSION

(2:30 p. m.)

Mr. CORREA. If your Honor please, at the outset may I state on the record that it is stipulated pursuant to the requirements of the statute and laws that a list of the Government's witnesses, including

their names and addresses, and a list of the panel from which this jury was drawn, with names and addresses, was served upon the defendant.

Mr. MEDINA. That is correct, your Honor. Those papers were duly and timely served.

Mr. CORREA. Thank you.

Opening statement for the Government

Mr. CORREA. May it please the Court, Members of the Jury: Now that you have been duly impaneled and sworn to the discharge of your all-important duty as the triers of the facts in this case, in terms of your oaths, it is your obligation to well and truly try the issues arising in this case as between the Government of the United States on the one hand, and this defendant, Anthony Cramer, on the other hand.

Now we start this trial, as is customary in all criminal cases, with an opening statement. The purpose of the opening statement is simply to outline for you in summary fashion the nature
3 of the charge upon which the defendant is being tried and the kind and character of the proof which the Government expects to adduce in support of that charge.

Further along this preliminary line, you are in this case the sole judges of the facts. Wherever in the course of this opening, or in any other point throughout the trial, defense counsel or I make any statement as to what the facts of the case are which disagrees with your recollection as to what the testimony of the witnesses and the other legally admitted evidence has been, then your recollection, and only your recollection, must control, and finally along the line of these preliminaries you are to take the law in this case from his Honor, the Judge of this Court, and from him alone.

Any statement which I may make in the course of the opening or at any time throughout the trial, or which any other counsel may make as to the law, is made for the purpose of clarifying the facts merely, and is in no way a binding statement upon you unless it agrees with his Honor's instructions to you as to the law of the case.

The charge in this case, as is customary in all criminal cases, is contained in an indictment returned by the Grand Jury of this Court. The indictment is an accusation merely, and has no probative force whatsoever. The indictment in this case charges
4 what I suppose is the gravest crime known to our law, the crime of treason in time of war. Under our statutes treason may consist in either one of two things, either in levying war upon the United States, and you may disregard that for that phase of the offense is not involved in this case; the phase of the crime of

treason which is involved in this case consists in adhering to the enemies of the United States and giving them aid and comfort, and that is the crime charged in this indictment.

Specifically, the indictment charges that on June 17th of this year, 1942, there arrived in this country two secret agents of the German Government by name Edward J. Kerling and Werner Thiel. The indictment charges that those men were representatives and agents of the German Government and that they were themselves enemies of the United States. The indictment charges that they were here, a common enemy, and came to this country on a commission for the German Government, to carry out that mission to the advantage of Germany in this war against the United States and to the Government of the United States.

It is charged in the indictment that that commission included crippling the war effort of the United States by sabotage of essential industries and other hostile enterprises. The indictment further charges that in June of 1942, when those two enemies,
5 Kerling and Thiel, arrived in the United States, the defendant Anthony Cramer was a resident of the United States; that he had been such since 1926, and that since 1936 he had been a naturalized citizen of the United States, which he is today, and was at the time the matters set forth in the indictment occurred.

The indictment charges that Cramer, as a resident of the United States, and as a citizen of the United States, owed allegiance to this country; that nevertheless Cramer, between June 17th and July 17th of this year, knowing Kerling and Thiel to be enemies of the United States, adhered to them and gave them aid and comfort, and in particular it is charged that Cramer during that period, that is, between June 17th and July 17th of this year, advised, counseled, conferred, and traded with Kerling and Thiel, knowing they were enemies; again, that he received and held and concealed property and funds of Thiel's for safekeeping, knowing that Thiel was an enemy, and knowing that Thiel was to use that property and those funds in the carrying out of Thiel's commission against the United States as an enemy of this country. Against this it is charged that Cramer made and attempted to make contact and establish communication for Thiel with persons whom Thiel instructed him to get in touch with, persons who might have been or be favorably disposed to Thiel's commission here, and that Cramer
6 did this by way of rendering aid and comfort to Thiel whom he knew to be an enemy of the United States.

Again it is charged that Cramer during this period gave to officers of the United States false information and made false statements to them which he knew to be false concerning Thiel's identity, and concerning his mission, and various facts about

Thiel with the purpose and intent of rendering aid and comfort to Thiel, who was known to Cramer at the time to be an enemy of the United States, and with the purpose and intent of concealing from the American authorities Thiel's true identity and his true commission.

In addition to the charge which is set forth in general, as I have outlined it, although in some more specification, there are set forth in the indictment ten overt acts committed by Cramer according to the allegations of the indictment in the carrying out of his crime of treason.

Under the law the Government is required to prove one, that is, at least one, of those ten overt acts by the testimony of two witnesses to the same act, and we will prove not only one, but several of the acts, in that manner.

I may add that actually we will prove all of the overt acts by getting sufficient proof as to at least one of them and
7 probably at least several of them by the testimony of two witnesses to the same acts.

Now, so much for the outline of the charge as it is set forth in the indictment which we are trying here. Let us turn now to the proof: the proof here will show an aspect of total war which is all too well known to us in the cases of other countries, but which, applied to our own country even when the concrete evidence is presented as it will be, seems nevertheless fantastic and unreal. Generally, the proof here will show that in April or some time in the Spring of this year, the German High Command decided upon a secret armed invasion of the United States, the continental United States, and set in execution such a plan; that there was entrusted to eight selected members of the German army forces the mission of clandestinely penetrating the continent of the United States, there to cripple the war effort of the United States by sabotage of certain vital industries essential to the carrying on of that effort. More appalling, the proof will show specifically, that in carrying out this mission the German High Command and the secret agents themselves relied upon the fact that there were in this country certain traitors and treasonable individuals who could be relied upon to render every aid, assistance, counsel, and advice within their power to those secret agents in the carrying out of
8 their mission and to do so without prior notification and without prearrangement of any kind or character. The proof will show that Crame was just such an individual, and the proof will further show that the fact that those enemies of the United States, Kerling and Thiel, were unsuccessful in completing their mission, was due to no lack of will or effort to aid them on the part of Cramer; more particularly the first phase

of the proof which the Government will introduce in this case will be devoted to showing and proving the essential allegations of the indictment, that Kerling and Thiel were in fact enemies of the United States, as the indictment alleges they were. Viewed from this aspect, which is the first phase of the Government's proof, this tale of treason begins in April 1942, at a sabotage school conducted by the German High Command in Germany, somewhere near Berlin. Attending that school were eight selected volunteers from the German Army. They were, and I will mention their names, and you will hear them from time to time throughout this trial, Edward John Kerling, Werner Thiel, Dash, Burger, Quirin, Heinck, Haudt, and Neubauer. Now the agents of those men had lived in the United States before. Kerling and Thiel had been, at the times they lived in the United States, acquaintances of this defendant, Anthony Cramer; in fact Thiel had left the United States to return to Germany to go into the army only in 1941,
9 and as the proof will show, had correspondence with the defendant Cramer at various points, or from various points, on his return trip.

Now when their training at this school was concluded, and after a short vacation or furlough, all eight of these members of the German Army were sent to a German naval base on the coast of France. There they were divided into two groups of four each, the one group being headed by Dash, and included Burger, Quirin, and Heinck, and the other group was headed by Edward John Kerling, one of the men named in this indictment as an enemy, and included Thiel and also Haudt and Neubauer.

Now the training these men had had, as the proof will show, had included specifically the manufacturing, use and employment in sabotage of explosive and incendiary devices. Before they left the coast of France each group was given a box or boxes containing a number of explosive and incendiary devices for use in the carrying out of their commission of sabotage. They were also given their paraphernalia such as civilian clothes, shovels for burying the materials in the sands when they arrived, and the like. In addition, however, to those weapons for use in carrying out their commissions, that is the explosives and incendiaries, each member of the entire group, that is, each one of the eight, was given another most important weapon for use in the carry-
10 ing out of their mission. Each of them was equipped with a money pack containing approximately four thousand dollars in American currency.

One day in the end of May of this year the Kerling group, the group that included Werner, Thiel, and Haudt, and Neubauer, left this naval base on the coast of France in a submarine headed for the coast of Florida. A day or two later the other group,

the group headed by Dash, which included Burger, Quirin, and Heinck, left in another submarine headed for the shores of Long Island.

In the early hours of the morning of June 13, 1942, the Dash group were rowed ashore from a submarine in a rubber boat and landed on the beach on the shore of Long Island, somewhere near Amagansett, Long Island. There they brought ashore with them boxes of explosives which they buried in the sand. They divested themselves of the German Army uniforms which they had been wearing in the submarine and changed into civilian clothes. Thereafter they proceeded by train to Jamaica, Long Island, where they stopped and made purchases of wearing apparel, shoes, and clothes, to replace their own which were wet and sandy, and then proceeded from Jamaica to New York City. Four days later the other group, the group headed by Kerling, which included as I have said, Werner, Thiel, landed on a
11 lonely beach near Ponta Vagra, on the coast of Florida. They, like the first group, brought ashore and buried in the sand they equipment they had by way of explosives and incendiary material and substances, and devices, and they also divested themselves of their uniforms and assumed civilian dress and, in the daylight hours of that day, which was June 17th, went into Jacksonville, Florida, by bus.

Subsequently, a few days later, Kerling and Thiel—Kerling, you understand the leader of the Florida group and Thiel a member of that group, and both of them named in this indictment as being the enemies this defendant Cramer adhered to, and to whom he gave aid and comfort—arrived in New York. Thiel was not long in New York before he got in touch with the defendant Cramer. On June 22nd a note was delivered for Cramer, or left at his room at 171 East 83rd Street. The note advised Cramer to go to the Grand Central Station to meet there friends of Chicago. Cramer followed the suggestion contained in this note, went to the Grand Central Station and there met Thiel. Now the proof will show that Cramer knew that Thiel had gone back to Germany, and this was the first that Cramer knew that Thiel was again in this country. Cramer and Thiel having met, repaired to a tavern nearby there known as the Twin Oaks in
Lexington Avenue, located, as my recollection tells me, in
12 Lexington Avenue, somewhere near 44th Street, but the proof will show, and there they sat down together and Thiel told Cramer that he, Thiel, had come to the United States by submarine and that he had been landed by rowing ashore in a rubber boat from the submarine; he told Cramer he had come to the United States on a mission for the German Government.

and he told him there were others who had come similarly and they were to get their instructions from a hide-out in the Bronx, and he also told Thiel he had with him a money belt containing approximately four thousand dollars in American currency for use in carrying out his mission; that is, the money had been supplied to him by the German Government for that purpose.

Now the proof will show that Cramer, mind you a naturalized citizen, and the proof will demonstrate that, owing allegiance to this country, and undivided allegiance, then and there knew that Thiel was an enemy of the United States. He knew he had been landed here and he knew he was on a mission for the German Government and he was equipped with the means of carrying it out. Nevertheless Cramer immediately began to aid and assist and help Thiel in every way within his power, and, in the words of the statute, to render him aid and comfort. He conferred with him at length, and in the course of their discussion he
13 suggested to Thiel that Thiel give him the money belt and the money for safe keeping; that he, Cramer, had a safe deposit box in which he could put the money to hold it until Thiel was ready to use it, and when they left that night they arranged to meet again at the same place the following evening, June 23rd. And the next evening Cramer again kept the date which he had made with Thiel and at the Twin Oaks Inn he met not only Thiel but Kerling as well, Cramer of course knowing, as the proof will show, before he came there, that the men he was meeting were enemies of the United States.

Cramer learned that Kerling also was an enemy of the United States and that he was one of the men who had been landed with Thiel and he, too, was engaged in executing a mission for the German Government. In fact, on this occasion, as the proof will show, Cramer learned for the first time that the two of them had landed only a few days before, for he had not learned on the previous night exactly when Thiel had landed here.

Again there is lengthy discussion among the three of them. In the course of this meeting Thiel, acting upon Cramer's suggestion that Cramer help him, went into the men's room of the Twin Oaks Inn and removed the money belt, brought it back and handed it to Cramer for safe keeping, which Cramer accepted and agreed to keep safely for Thiel.

14 After being together in this conference and discussion for one or two hours—and this meeting, by the way, is the subject of one of the ten overt acts set forth in the indictment—after this discussion Kerling left and Cramer and Thiel themselves left the Twin Oaks Inn and repaired to the Thompson cafeteria in

the Grand Central Station on 42nd Street. There they remained deep in conversation and after they came out and walked for some time up and down the street, very engrossed in discussion, they finally departed, having made an arrangement to meet again on June 25th, which was the second following day.

Now on the morning of June 25th Cramer, pursuant to Thiel's request and in line with his purpose and intent of aiding and comforting Thiel, took the money belt which he had, you see, from the evening of June 23rd when he received it, and removed the money from it. This he did in his apartment. Then he secreted the money belt in his apartment, hiding it somewhere around the apartment. He took the money, and after noting how much there was there on a piece of paper—if my recollection serves me it was about $3,500, I do not have the exact figure in mind—he took the money to the local branch of the Corn Exchange Bank where he, Cramer, maintained a safe deposit box, renewed his rental of the safe deposit box and placed the money in the box for safe keeping for Thiel.

15 Now the proof will show that at the time he did this, Cramer knew that Thiel, the man for whom he was doing it, was an enemy of the United States. He knew that Thiel intended to use this money in the carrying out of his mission for the German Government, and those acts, the hiding of the money belt, the safeguarding of the money and taking it to the bank, are the subject of some of the overt acts set forth in the indictment.

During the next two days Cramer tried without success again to contact Thiel. Unknown to Cramer, Thiel was already in custody of the Federal Bureau of Investigation. Cramer did not know that, however, and kept up his efforts to get in touch. On one occasion he left a note for Thiel at the Commodore Hotel under Thiel's assumed name of William Thomas. Thiel had been staying at the Commodore Hotel and registered in the name of William Thomas, as Cramer knew.

Now one of the things that Thiel had asked Cramer, the defendant here, to do for him was to get in touch with a woman by the name of Norma Kopf, who had been a friend of Thiel's before he left this country to return to Germany in 1941.

Cramer assuming that Thiel's request of him was for the purpose and intent of rendering him aid and comfort, wrote

16 Norma Kopf a note. She was in Connecticut where she worked, and he told her to come to his apartment on East 83rd Street as he had big news for her. He did not say exactly what the nature of the news was. Norma Kopf came to Cramer's apartment and there Cramer told her the great news, as it was to them, that Thiel was back in the United States; that he had been

landed here from a German submarine and that he was here on a mission for the German Government.

Cramer, pursuant to Thiel's request and wish, asked Kopf to accompany him down to the Thompson cafeteria in Grand Central Station to meet Thiel, and Norma Kopf acceded, and Cramer brought her down and they were unsuccessful in contacting Thiel because, as I have already mentioned, at this time Thiel was in the custody of the Federal Bureau of Investigation although that was not known to Cramer.

I might add that the bringing of Norma Kopf down to meet Thiel was one of the acts of aid and comfort and one of the overt acts in the carrying out of the treason which is charged in this indictment.

Finally on the night of June 27th, Cramer himself was apprehended by the Federal Bureau of Investigation. Now at the time that Cramer was taken into custody he did not know that Thiel was already in custody. Consequently in pursuance of
17 that purpose of rendering aid and comfort, of assisting Thiel and helping him in his mission, Cramer made a number of false statements about Thiel to the F. B. I. immediately upon his apprehension; in particular he denied Thiel's identity; that the man he knew was William Thomas. When they asked had he been seeing a German down in the Hotel Commodore, around in that neighborhood, he admitted to concealing the facts which he knew concerning Thiel's arrival in this country by saying this man, William Thomas, had been in this country all along and had been employed somewhere out West, if my recollection serves me; he also admitted to concealing the facts concerning Thiel's money belt which he had taken for Thiel to safeguard and hide for him, similarly concerning the money in the safe deposit box, Cramer said that was his money made from stock deals, or something of that character.

These statements made by Cramer in pursuance of this effort to cover up Thiel and conceal his identity, and conceal his mission, and, in short, to give him, in the words of the statute, aid and comfort, are the subject of the last ten overt acts set forth in the indictment.

In general those are the highlights of the proof which the Government will introduce in support of this charge that the defendant here, Anthony Cramer, adhered to the enemies of the United States and specifically to Edward John Kerling and
18 Werner Thiel, both enemies of the United States, giving those enemies aid and comfort.

Before closing, however, I should like to call your attention to one other phase of the proof in the case. This indictment ends,

as is customary in all indictments in criminal cases, with the statement that what has been set forth was contrary to the statute and against the peace and dignity of the United States, but it also has another phrase, it says "contrary to the said Anthony Cramer's duty of allegiance to the United States," which is peculiarly an essential to the crime of treason.

Now we will introduce in the course of this trial proof of Cramer's motive. Mind you, his intent will be clear because he did what he did with knowledge, and knowledge that the man and men he was aiding and comforting were enemies, and further than that, we will show what his motive was.

There has been some discussion here about the question of pre-Pearl Harbor isolationists, and isolationism, but we will show in the case of Cramer that he was opposed to the United States, out of sympathy with the United States, insofar as any policy prior to the declaration of war was concerned, but also with respect to the carrying on of the present war by the United States at the very time when he was doing the things charged in this indictment which are the substance of the charge against him.

19 We will show, too, that his sympathy and his loyalty, despite allegiance, or despite the allegiance which he owed to this country, were in fact with the enemy; that is, were in fact with Germany.

Now in concluding, member of the jury, on behalf of the Government, we ask you throughout this case to keep an open mind. Do not make up your minds at any stage of the case until all of the evidence is in and the case has finally been submitted to you for your verdict, and when that time comes, I feel confident you will be convinced of the guilt of this defendant of the crime with which he is charged beyond any reasonable doubt.

Opening statement for defendant

Mr. MEDINA. May it please the Court, Mr. Foreman and Gentlemen of the Jury: I am going to be perhaps a little bit more colloquial and less formal in my statement of our defense than my adversary; largely because each person has to deal with his own way of doing, and I say that because I don't want you to think that I mean it in any criticism of him at all, but I have just a slightly different way of going at these things.

This is probably the most serious case that either you gentlemen or I shall ever have anything to do with. And I
20 want to be sure that we go at it in the most serious way that we can. Now to begin with, I want to have you understand that there are certain rights that the defendant has

that I am going to do my level best to see that they are carried out. The first is that we do not just start from scratch here today. The defendant starts a little better than scratch, because he is presumed to be innocent, and the only way that presumption can be good for anything is to have you gentlemen really start the case feeling he is presumed to be innocent, and that is the way we have got to start.

When we get to the end, as Mr. Correa has already indicated to you, you cannot bring in a verdict of guilty if there is a reasonable doubt in your mind as to any of the material and essential facts. Now those are big, basic principles. They are not little things to be lightly considered. As far as we see this case, perhaps a little differently from other cases of a different character, but as we see it, it is to this defendant's advantage from the beginning to end to simplify the case, to clarify it, to have the issues perfectly crystal clear for each and every one of you gentlemen and understand it. It is not always easy to do that in an opening. I am going to try to lean over backwards, and instead of giving you exaggerated statements, things that may or may not be so, I am going to try to deal with you
21 just as I would with associates or business people I was working with, to make an understatement rather than an overstatement.

Let us see just what is involved and then let me show you what the position of the defendant is as to each of those issues.

The first one, as Mr. Correa has indicated, is that the Government must show that these persons, Thiel and Kerling, with whom Mr. Cramer is alleged to have had dealings, were really enemy spies here to do the work of the German Government. They must show that, of course. And I say to you gentlemen, and I admit in the most formal way for this record that the defendant admits that that is so. That is not going to be an issue in this case. It is not going to be a real issue now, of course, because the defendant does not concede that he knew that to be so. That is something different. But as far as that fact is concerned of Thiel and Kerling being German spies who came over here to do damage to our country, that is not going to be an issue in this case because that is so. It is admitted to be so. I say that for two reasons: naturally I am here to defend Mr. Cramer. Make no mistake about that. I am saying nothing here for the assistance of anybody else. You may assume every word I utter here will be taken by me to be in some way to his advantage. I don't want to make any bones
22 about that at all. That is what I am here for, so I say that, and I make that statement here in the beginning.

first because I do not want to see this trial unnecessarily prolonged. We have a certain issue. Let us stick to that. Furthermore, I believe that if we have a great many witnesses called and a whole lot of exhibits brought in on that particular issue, that are copied from others Cramer had nothing to do with at all, I say that would be prejudicial to him and I intend to object to cumulative evidence of that kind coming in. I want to remove all issues from the case, as far as I can, because we all know these people really were spies that came here as saboteurs to do sabotage. Now that is that.

In the second place, the law requires in a treason case that no man can be convicted of treason without intending a traitorous and treasonable intent. You cannot convict a person by inadvertence. You cannot convict a person by merely doing something that is an unintelligent or negligent thing or something that is a stupid thing. You have to have a traitorous intent. Now the whole issue in this case, gentlemen, the one hundred percent issue in this case, has to do with the alleged traitorous intent. That is the only thing that we are going to try our level best to convince you gentlemen that Cramer did not entertain at any time,
23 and then, besides that, there are all these acts that are referred to, which are called overt acts. Now I am not going to attempt to be over detailed and specific as to each and every one of those, but I say this: the law requires, as Mr. Correa has indicated, in a treason case certainly very technical rules of proof. You remember he mentioned about these two witnesses that were required in the United States Constitution and rights in the statutes, and there is a great historical basis for that. Naturally I am going to take advantage of those legal technical rules as far as they may be applicable, but assuming that Mr. Correa can do what he says he is going to do, that he is going to comply with those technical rules as to the overt acts, I tell you that as far as this business of Mr. Cramer taking that money belt from Mr. Thiel and taking it around to his safety deposit box and putting the money in there and writing this note to Norma Kopf, and writing that note that was left at the Hotel Commodore, he did those things. I am not going to stand here and attempt to tell you things are not so when they are, and you may be assured that what is left of this case, and what our defense is based on is that when he did those things he hoped to convince you gentlemen that he, at no time, intended a traitorous intent; that far from knowing that those people were spies here to sabotage and to carry out this com-
24 mission of the German Government, he says he did not know that.

Now, how is one to convince twelve men in a jury box, and tw

alternates, *if* a person's state of mind? That is what we are embarking on here. I want you to know it right from the beginning, that that is the issue and the sole issue. This is the way I am going to put it: first, I want to have you gentlemen understand certain chronology. I am not going to get into a lot of complicated dates, but my experience with juries is if you give them the dates to go by they will remember them and pick them up as the evidence comes in.

Now we start out that Cramer was born in Germany on October 5, 1900. Well, they are going to perhaps bring out, and I was a little surprised it was not referred to in Mr. Correa's opening, that Cramer was in the German Army. Now just do a little calculating, gentlemen: October 5, 1900. Where does that bring you in 1918? That brings you just a week or two before the Armistice, doesn't it? And he, as a boy there in Germany, was brought into the German Army just like every other young boy was. He did not have anything to do with it. As a matter of fact, the amount of time he spent in the German Army was about a week or ten days, or something of that kind, and then the war was over and he was out.

So there is his birthday, October 5, 1900. Now long after the war was over, conditions were pretty bad there in Germany and so he came over here in 1925. I am not going to try to tell you gentlemen that he came over here because he was fired with a great patriotism for the Stars and Stripes or for the American form of government or something of that kind, but he comes over here then the way so many hundreds of thousands of those people did because he wanted to find an honest way of making a living which he could not make over there, and you will hear him testify because my anticipation is he will be on the stand to tell you all this story himself. You are going to hear how he came over here; that it was a sister-in-law of one of his brothers who wrote letters over from Iowa, talking about the farming out there and how easy it was to make a living here compared with the terrible conditions that existed in Germany. That is how he came over, and that is 1925.

Then the next date we have here is the day he met this fellow Werner Thiel. It would have been a grace, or much better thing for the defendant, if he had never met him, because this is the first time that Anthony Cramer has ever had any contact with the law. His record has been just as good as any man's could be. We are going to show you that. He has never been in any kind of trouble before in his life until now. But in 1929 he met this fellow Thiel out in Detroit. They were both working out there, one in one of these automobile factories and

another working in one of the others, and we are going to show you, and I am not going to take all the time to detail it here in the beginning, but we are going to show you how the friendship of these two humble workers developed, and one of the difficult things you gentlemen are going to have to do and one of the things I find it difficult to do, is to understand Mr. Cramer. He is of a different life than the rest of us. He lives a different life. He has been in a different sort of a world in a way. You have got to be fair to him, to try to understand him and try to understand how things look from his angle; very different, I can assure you, from the way those things look to the rest of us. So that friendship developed and went on for years. There were times when there was not a day in which Thiel and Cramer did not see one another. They would spend their evenings together. They roomed together for a considerable period of time. Mind you, long before there was any war on or any war expected. That is why I want you to remember that year of 1929. It not only meant the depression, it meant the meeting of Thiel and Cramer, and then it also affected them through the depression because there was no more work to do out in Detroit, and so they came to New York, and you are going to hear all the story about that, but I want now to have that date of 1929 and the commencement of that friendship which took a normal ordinary time to develop, I want you to remember that.

The next date that I want to have you remember is 1934 to 1935. Now that was a time out in Hammond, Indiana, when Cramer was a member of that Friends of New Germany. He was out there. Thiel later went out there too. They knew practically no one else around that place, and so they joined, as he tells me, and as I will tell you, they joined that particular organization largely for the social recreation that they would have, and more that than anything else. He tells me, and I believe the fact to be, that there was no drilling, none of this Band business which developed in later years; none of that sort of aggressive business, but a recreational way in which these German-Americans could get together and drink their beer and have their exercises and their recreations, and then the next year, 1936, he became an American citizen.

Now why do I want to emphasize 1934 and 1935? It is because that is the only time, as we will prove to you, that this defendant ever had anything to do with any of these German organizations. We have all heard a lot about them. One of the curious things here, curious taking everything into consideration, and one of the helpful things to Cramer, is that he has not had anything to do with those organizations since that single

years before he became a citizen, when he was out there in Hammond, Indiana, and we are going to show you that Thiel's development was a very different one. From those days onward, this man Thiel got further and further and deeper and deeper into this Nazi doctrine, into these pro-German activities, and into the Bund, and that and the other thing, and you are going to find, and surely if this were not so the Government could contradict it with the utmost ease—they have every possible facility to show these things are not true if they turned out not to be, and I believe if Mr. Cramer tells me so, he did not join the Bund or have anything to do with those organizations, but he had many a discussion and argument with Thiel, and on those matters their paths went in different directions.

Now those I say are things to bear in mind when you are dealing, as you must, with this man's state of mind. You have to think of those things.

In 1941, which is the last date I have to mention as such, except those specifically mentioned in the indictment, was the time that Thiel went back to Germany. He of course was not a citizen. Despite the friendship between these men, Thiel never gave up his German citizenship; never exhibited any desire to do so, and he went back to Germany in 1941, whereas Cramer did the opposite. So much for those dates.

Now they lead up to a period and the only period so far as I know, that involves anything that it is claimed that Cramer did. I do not believe the Government is going to make any claim whatsoever, and indeed if they do we believe we will absolutely disprove it, to the effect that when Thiel went back to Germany there was any prearrangement with Cramer about doing any work for the benefit of the German Government and all that. In fact, as I understood Mr. Correa's opening, he made a frank disclaimer of that. You remember he used the expression "without any prearrangement," and I believe, as I read that indictment, they do not accuse Cramer of having made any such arrangement in advance, and that the fact is that he did not.

So that we come down to June 22, 1942, without any claim being made that Cramer did anything, so that there is where he starts to function, I say, so far as this indictment is concerned. Now that is terribly important, gentlemen, if it is so, and I feel sure that it is, and let me, in order to full out the little chinks there, go back a little bit.

Now you remember the statements that were made by Mr. Correa about what they were going to prove and as to motive and as to Cramer's disloyalty and as to his treasonableness and all that. Mr. Correa mentioned in connection with the

questions that had been put to you gentlemen before you were selected as jurors, about the isolationism and pro-Germanism and things of that kind; naturally you expect some statement from him on that, and I am making it because it is a very material thing: here is what I believe you are going to find the evidence will show, Cramer, of course, was born in Germany. He was a man whose natural sympathies were with the Germans. There is no doubt about that. Those are matters, as far as I can see, that were not only part of his fibre, part of his self, just as Canadians or Englishmen, or people of other nationalities would naturally and favorably be inclined to, people of their own race and their own birth, it seems to me a not unnatural think, and besides that we have here is contact with German-American people that he went around with, with German-Americans, and so over a period of time we have a lot of things that he did that I say, as far as being before Pearl Harbor is concerned, he had a perfect right to do, but it is so easy for you gentlemen to misunderstand that, or misinterpret that. I say it makes a difference. Maybe you won't take that view. I don't know. But in any event,
you are going to find that whatever Mr. Cramer indicated
31 as to feeling and liking for German people, being with
them and liking the Fatherland and being favorable to
it, as contrasted with other countries, that there was a fight going on before Pearl Harbor, you are going to find some evidence of that kind and I ask you to hold your judgment in abeyance until you have heard it all, because you are going to have to consider, not merely whether Cramer has different ideas from yours, but whether his ideas are treasonable; whether his mind at the time he did those things entertained a traitorous and treasonable state of mind which, as has been indicated to you, is the worst crime of the whole catalogue of crimes known to our jurisprudence. It is not something you easily attribute to him without a good deal of evidence.

Now we come down to these specific things; what he is said to have done or what occurred in just one short week in June of this year. Mr. Correa says these people landed from submarines on June 17th and June 13th, I think, and that was not when Cramer came into the picture. He started in on June 22nd, which was a Monday, and on that fateful day for him there was slipped under his door—he was a man working over in a boiler room of this National Licorice Company, and you can tell by looking at him, and you will hear his whole life, of his work, he is a humble man;
he is a man who has worked in humble employments; he is
32 not one of these smart fellows that you would expect to be
part of a spy ring or anything of that kind—I do not believe they pretend he was—there he comes home after working on

the night shift and he is about to go to bed when he hears a knock on his door and somebody calls his name and he thinks probably it is some salesman and he does not pay any attention, and the note is slipped under the door and he picks up the note and, as Mr. Correa says, in substance, "there is a friend of yours from Chicago that is in town and wants to see you and meet me in the New York Central information booth at eight o'clock tonight." That was like a bolt out of the blue as far as Cramer was concerned; no prearrangement, no pretense of prearrangement. We have heard all that mentioned clearly in the indictment. I do not believe there was ever any. So he hesitates and finally goes down there and as he is about to leave, about ten minutes after eight—and if he had left at eight o'clock promptly when he was supposed to be there, this thing would never have happened, but he delays an extra ten minutes and he turns around and there was Thiel, and that is how the thing started.

I am not going to attempt to tell you and to burden my memory with each little detail of what occurred in that week, but
33 he did meet with Thiel. We deny the allegations that they were conspiring and aiding and abetting and all that sort of thing that involves a knowledge, because you remember our position is that he did not know, that he did not entertain the treasonable and traitorous intent, and he did go around to the Twin Oaks Tavern with this fellow Thiel, and the next night he was in there and Kerling was there, too, and this business of the money belt and taking it around to the safe deposit box, as I indicated to you before, those things were so.

Now there is a little detail that just may help a little bit here: Mr. Correa says that he concealed the money belt. One of the things that we are going to urge upon you, and we are going to prove as tending to show the lack of any traitorous intent, is the way in which Cramer kept everything that he had and saved for years around his room there. Some of those things may be material; some of them may not; but what I am saying to you now is that there was no attempt of any concealment. What did he do with the money belt? If he had thought he was part of some dangerous scheme that would perhaps lead to the electric chair, wouldn't he have destroyed that? Would he have left it around the room? There were various other things indicating these feelings favorable to Germany such as I have referred to here. He put it in his box where he had his shoe cleaning
34 things. He was going to use it to shine his shoes with. He had no more idea, as we hope to show you, that he was a part of some traitorous, dangerous spy ring here than anything at all, so that it is a characterization. You might call that concealing it. Why, no; that is not concealing it at all. He put it in that box.

He might have thrown it in a wastebasket as well. He was not concealing it at all because anybody coming in there and looking around would find it, as they did find it. That is just a detail as to that.

Now you come down to the business about his whole life. I am not going to attempt to tell you all about it here in this opening, but I do want to tell you enough about it so that you will get some idea of what is coming.

He was born in a little bit of a town called Ollendorf, Germany, which is in Westphalia. It is so small that if you get a map of Germany out, even a pretty up-to-date map, you won't see it at all. It is maybe a little place of about eight hundred people, a farming district. His father was a farmer. His brothers, some of them, are now farmers, and the family is still at the same old place.

So he started out by that and then he worked in the mines
35 a little while and then he worked in a shipyard turning flanges, and then he came over here and he has worked at about everything you can imagine: honest work, real labor: never been discharged in all these years he has been here.

Now we say, please listen to him. As you see him on the stand try to look into his mind and see whether you think really the man looks and acts and talks like a person who is a traitor. Try your level best, we beg you, to put yourself in his position. I have found that was hard to do as I prepared to defend him here. I do not know people like that. I have not had much to do with them. It is so hard to get their point of view. Now all we want you to do is try to do that to the best of your ability.

Now about this Norma Kopf. They speak about her in the indictment, and also in this opening. As they say, she was some kind of a member of a spy ring. I do not believe that is so at all. I think you are going to find when the Government calls her as a witness that she is just a plain ordinary service girl, and where she fits in this picture is that she was, as the defendant tells me, practically engaged to this man Werner Thiel. She and Thiel had been friendly for a long time. The anxiety of Thiel to see her and to get to speak with her again is perfectly natural under those circumstances. I do not think for a min-
36 ute that she is going to admit that she had some sort of spy activity which she was in or expected to be in or ever had anything to do with it at all; not a particle of it, and was either a friend of this man, but more particularly a friend of Thiel and this sending of the letter to tell her there was "great news" for her—I think the letter actually used the expression "sensational news", it was something from Cramer's point of view whi-

was a wonderful thing for Norma to know Thiel was back, and they wanted to surprise her when they met, and he would see her, and it was decided not to mention that she would be surprised to see what they here want you to think. Maybe there is something sinister about it; maybe there is not. I do not know. All I ask is that you listen and hold your judgment in abeyance so that these people when they take the stand can be appraised by you.

They speak here about the submarine, and coming over on the submarines. Well, here is what the situation, as I understand it, is, and I am not going to attempt to give the wording of each of the conversations, but the substance of it is that there were two or three times during this week when Cramer and Thiel were together when Cramer said, "How did you get here? You must have come over by a submarine," and by the expressions that were used by Thiel, he said Well, you wait until we all get together with Norma and I will tell you the whole story
37 about the thing." But it left the impression in Cramer's mind that perhaps he probably did come here that way, but he never knew from anything Thiel told him or that Kerling told him or anyone else told him, that these people were spies here with a mission of the German Government for the purpose of sabotage.

Now if you consider these conversations as I am telling them to you, and his reporting that to Norma Kopf, it is so easy for Norma to put it just a little differently. It does not need very much change to put a sinister bearing upon it; to make it look far worse. So when you hear her testify what the defendant told her, just use that same judgment that you use in your everyday affairs of life to see whether that is strictly accurate. Would she be likely to remember it exactly word for word? Is it something that perhaps has taken on a little different slant in her mind since that time? I do not know.

Anyway, there is the story.

We say there is one issue only in this case and that is the intent, the state of mind of this man, and bear in mind, as I conclude, you cannot find Cramer guilty because he was a fool, because he was stupid, because he was negligent or because he should have done something else if he had had any sense, or things of that kind. You have to find that that traitorous intent existed.

38 Perhaps there is one other detail I ought to mention because I think it is well for you to have it in mind as the proof comes in; of course there is going to be a lot of testimony about the money, how he counted the money; how he put it in the box, and some of it he put aside in a little different pile there, and all I am going to do here is to indicate to you, so you won't

be surprised when the evidence comes along, that over this period of years when Thiel and Cramer were friendly and intimate together, Thiel never was as careful and plodding a man as Cramer was, and so there were certain loans that Cramer made to Thiel, and it so happened that he had a little book and the F. B. I. people have that little book here and it is probably in court now, or it will be later anyway, in which those things were written down, those little loans, with the advances, and those loans come into the picture because when Cramer took this money around to a safe deposit box he as told by Thiel he could take the couple hundred dollars that was owing to him by Thiel and that financial element comes into the picture.

I want really the assistance of you gentlemen. You have fourteen minds here. You are going to listen to that evidence. You are going to think of a lot of things that won't occur to either Mr. Correa, or I, or the Judge, but you are here to do justice
39 to this man, and when you hear that evidence you will appraise it and fit it into this man's background, or what it possibly had to do with it.

I told you before we want to simplify the issue. I hope what I have said to you here this afternoon makes you feel sincerely that I mean that. No man could confine an issue to a mere mental operation unless he meant to simplify. It must be so. I say to you gentlemen further than that you are going to have no appeal in this case to your sympathy or to your emotion. The defendant here wants justice. He wants justice and no more and he wants it according to our American standards. There is going to be no talk about sentiment and no talk about emotion or that sort of business, nor are you going to have any of these attacks that make one so sick that so often come into these criminal trials upon these Government men. You are not going to hear me make up a cross-examination on these Government men, and make out that statements made by Cramer were made under duress or due to some monkey business; nothing of that kind. They treated him splendidly and they treated him fairly. I believe when these men do their duty, as they do it nowadays, their usefulness is enhanced by the fact that they are fair and they seek to find the truth
40 and seek to do right. You are not going to hear me say anything to detract from that, so don't expect any of those silly fireworks that to my way of thinking prejudice defendants far more then they help.

Thank you.

The COURT. Mr. Correa, I understand that the Government and counsel for the defendant have planned to proceed with the testimony tomorrow morning and that the witnesses will not be available this afternoon.

Mr. CORREA. Yes, that was the suggestion made just before we adjourned for lunch by counsel for the defendant, and we acceded to that request.

The COURT. Yes.

Mr. MEDINA. We will start taking testimony tomorrow morning, your Honor. Yes, that was my understanding.

The COURT. That was what you suggested.

Mr. MEDINA. Yes, I did.

The COURT. That being so, we will adjourn this case until tomorrow morning at half past ten.

(Adjourned until Tuesday, November 10, 1942, at 10:30 a. m.)

41 [Title omitted.]

NEW YORK, *November 10, 1942;*
10:30 o'clock, a. m.

Trial resumed.

JEAN HURST, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. CORREA:

Q. What is your occupation, Miss Hurst?—A. I am deputy clerk in charge of the Hammond, Indiana District Court.

Q. That is the United States District Court?—A. That is right, for the Northern District of Indiana.

Mr. CORREA. I will have this paper marked for identification, please.

(Marked "Government's Exhibit 1" for identification.)

Q. Miss Hurst, you have been subpoenaed, have you not, to bring here certified copies of certain records of the naturalization part of your office?—A. Yes.

Q. I show you Government's Exhibit 1 and ask you are these the papers included in that exhibit, not certified copies, which you have brought here pursuant to subpoena of the records con-

42 tained in the court of which you are a deputy clerk [handing to witness]?—A. They are the certified copies.

Q. And they are the naturalization papers relating to the naturalization of one Anton Cramer?—A. That is right.

Q. And they are all the papers in the files of the court relating to that naturalization?—A. All that we have in our office.

Mr. CORREA. May I ask that this be marked——

The WITNESS. Just a minute.

Q. Do you have any objection to their being marked?—A. Yes, sir; that is from our files. The same information is on the back of the petition.

Mr. CORREA. May this paper be deemed marked, in view of the fact that it is part of the records of the court of Indiana?

The COURT. Yes.

(Deemed marked "Government's Exhibit 2" for identification.)

Q. I show you this paper which has been deemed marked Government's Exhibit 2 for identification [handing to witness], and ask you if that is also a part of the records in your court pertaining to the naturalization of Anton Cramer?—A. That is right; it is.

Q. Referring to the signature appearing at the bottom of
43 this printed form which is Government's Exhibit 2 for identification, under the practice obtaining with respect to records of this kind in your court by whom is that signature written?—A. By Anton Cramer.

Q. That is, by the person applying for naturalization?—A. That is right; yes.

Mr. MEDINA. That is the defendant's signature.

Mr. CORREA. In that event, if your Honor please, I would like to offer, assuming counsel for the defendant will agree, just a certified copy of the naturalization papers, and not Government's Exhibit 2, which is a part of the original records of the court, and which I take it this young lady wishes to return to the records.

The WITNESS. That is right.

Mr. MEDINA. If your Honor please, it is agreeable to us to have either or both offered, or if Mr. Correa desires a photostatic copy to be made of this card and substituted for the card, that is entirely agreeable. And we make no objection to the proceeding, in whatever manner he desires.

Mr. CORREA. I take it, if your Honor please, that in view of the concession concerning the signature on Government's Exhibit 2, it is conceded these are the records of the naturalization of this defendant Anton Cramer in Hammond, Indiana, at the date there.

44 Mr. MEDINA. I have not examined the paper marked 1 for identification. The concession I made had to do with the card. But if I take a moment to examine this paper I have no doubt I will make a similar concession as to this.

Mr. CORREA. All right. Judge, in view of the fact this paper ought to go back to the court if it can, I suggest that we take a moment to give counsel time.

The COURT. Do you withdraw the offer of Exhibit 1 for identification?

Mr. CORREA. I had not marked Exhibit 2, Judge, and the offer of Exhibit 1 is pending while counsel examines the exhibit.

Mr. MEDINA. These are all right, Mr. Correa.

Mr. CORREA. I take it there is no objection to the offered exhibit.

Mr. MEDINA. There is not, to either or both of them. There is no objection whatsoever.

Mr. CORREA. Is it conceded, sir, these papers relate to the naturalization of this defendant?

Mr. MEDINA. Yes.

Mr. CORREA. You will note the name is Anton Cramer.

Mr. MEDINA. Yes; but that is the name that he signed there, and of course the difference is purely verbal.

Mr. CORREA. Then, if your Honor please, I also offer a photostatic copy of Government's Exhibit 2 for identification.

Mr. MEDINA. No objection.

(Government's Exhibits 1 and 2 for identification now marked in evidence.)

Mr. CORREA. I will return the originals to the witness. Thank you [handing to witness].

If your Honor please, may I call the jury's attention to this exhibit without reading it at length, because they are naturalization papers.

(To jury): Members of the jury, Government's Exhibit 1 is the naturalization file of the District Court for the Northern District of Indiana located at Hammond, Indiana, relative to the naturalization of Anton Cramer, who according to the stipulation of counsel is identical with the defendant in this case. The naturalization according to the records was made on Novemebr 9, 1936, and the certificate was issued contained in the naturalization papers, and signed and sworn to according to the papers under that date is the oath of allegiance of the defendant Anthony Cramer. The oath reads: [Reads from exhibit.]

Exhibit 2 in evidence, which is another record of the clerk's office, a form indicating the date of issuance of the certificate of naturalization, indicates that was issued November 9, 1936, to Anton Cramer residing at St. Lazarus Hospital, 50 Clinton Street, Hammond, Indiana.

Mr. MEDINA. May I inquire as to your Honor's pleasure with reference to our commenting on certain portions of the exhibits? I would prefer if your Honor will permit it to call such parts of the exhibits to the attention of the jury later, when we are in the defendant's case. But of course I shall follow whatever direction your Honor makes.

The COURT. I think that is better.

Mr. MEDINA. Thank you.

Mr. CORREA. I have no further questions of this witness.

Mr. MEDINA. No questions.

47 ERNEST PETER BURGER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr CORREA:

Q. Where were you born?—A. Augsburg.

Q. And where is that?—A. Germany.

Q. And when?—A. September 1st, 1906.

Q. When for the first time did you come to the United States?—A. 1927.

Q. And where did you enter the United States?—A. New York.

Q. In the port of New York?—A. That is correct.

Q. How long did you remain in the United States on that occasion?—A. Until 1929.

Q. Where did you go then?—A. I went back to Germany on a short visit.

Q. Did you return to the United States?—A. I did.

Q. When did you return the second time?—A. In September 1929.

Q. And you remained until when?—A. Until 1933.

Q. Did you then again visit Germany?—A. I went back to Germany.

Q. Did you come to the United States again?—A. I did.

Q. When?—A. 1942.

Q. Did you at any time after you returned to Germany
48 in 1933 join the armed forces of the German Government?—A. I did.

Q. When?—A. 1941.

Q. When in 1941?—A. In August.

Q. What branch of the armed forces did you join?—A. Infantry.

Q. Of the army?—A. That is correct.

Q. While you were serving in the infantry of the German army did there come a time when you volunteered for special duty?—A. That is correct.

Q. When did that time come?—A. In March 1942.

Q. What did you do?—A. I volunteered for a special assignment.

Q. Did you receive any such assignment at that time?—A. I did.

Q. At what time?—A. In March 1942.

Q. What was the assignment you received?—A. I received a transfer to a group of volunteers for a special assignment.

Q. Were you sent any place in particular at that time?—A. Not at that time.

Q. Did there come a time when you were sent somewhere in connection with this special assignment?—A. That is right.

Q. When was that?—A. In April.

Q. Where were you sent?—A. To a town near Berlin; Brandenburg.

Q. Brandenburg?—A. That is correct.

Q. Where in Brandenburg were you sent?—A. To an estate near Brandenburg.

Q. Who was at the estate near Brandenburg?—A. A group of volunteers which took part in our special assignment.

Q. And what did you do at this estate near Brandenburg?—A. We received certain instructions.

Q. Was that a school of some kind?—A. It was a course.

Q. A training course?—A. That is correct.

Q. How many others were there at the time you were there?—A. Seven.

Q. Seven others?—A. That is right.

Q. Could you tell us their names?—A. George Dash, Heinrich Henck, Richard Quirin, Herbert Haupt, Edward Kerling, Neubauer and Werner Thiel.

Mr. CORSEA. I would like to have marked for identification these photographs.

(Marked "Government's Exhibits 3 to 10" inclusive for identification.)

Q. You mentioned as being at this school Edward Kerling?—A. That is right.

Q. Was his full name Edward John Kerling?—A. I believe so.

Q. And Werner Thiel, did you say?—A. Werner Thiel.

Q. What instructions did you receive at this school; you and these other seven?—A. We received instructions concerning our assignment.

Q. Can you tell us more specifically just what you were instructed?—A. We were instructed on chemical combinations; the use of chemical combinations, and—that is all.

Q. You say you were instructed in chemical combinations; what kind of chemical combinations?—A. Incendiaries and explosives.

Q. And how were you instructed in the use of such chemical combinations; their use for what purpose?—A. For damaging the American light metal industry.

Q. Was any metal industry in particular mentioned to you at this school?—A. Yes; aluminum.

Q. I show you Government's Exhibits 3 to 10 inclusive for identification, being eight photographs, and you will note the identification numbers on the backs. Would you be good enough

to look at them and tell me, referring to the number on the back, if you are able to, of whom each photograph is a representation?—A. No. 6, Werner Thiel.

Q. That is Government's Exhibit 6 for identification.—A. No. 5, Edward Kerling; No. 4, Herman Neubauer; No. 3, Herbert Haupt; 10, myself; 9, George Dash; 8, Richard Quirin; 7, Henry Heinck.

51 Q. How long did you remain at this school?—A. From the 10th or 11th of April until the 1st of May.

Q. And on the 1st of May, where did you go?—A. I went back to Berlin.

Q. Did the others go with you on that time?—A. They all went on a vacation.

Q. And were you on vacation at that time?—A. I was.

Q. How long was your vacation?—A. Until the 12th of May.

Q. And after your vacation where did you go?—A. We visited certain plants; aluminum plants.

Q. Where did you report after your vacation?—A. In Berlin.

Q. And were the others there then?—A. That is correct.

Q. And then what did you do after that?—A. We visited certain plants; aluminum plants.

Q. Aluminum plants located where?—A. In Germany.

Q. And what happened on those trips?—A. We were instructed on certain machines and institutions of these different plants.

Q. What were you instructed concerning the plants that you visited?—A. We studied the vulnerable spots and points.

Q. Vulnerable spots?—A. That is correct.

52 Q. And how long were you on that trip?—A. Three or four days.

Q. When you returned, to where did you return?—A. To Berlin.

Q. And then what happened?—A. Then we left for Paris.

Q. Before you left Berlin for Paris did you receive and instructions?—A. We received our equipment and certain instructions.

Q. You say you received equipment. What equipment did you receive?—A. We received explosives.

Q. In what form, sir?—A. Different forms.

Q. Were you given boxes of explosives?—A. That is correct.

Q. And were you shown before you were given the boxes what kind of explosives were contained in them?—A. That is correct.

Q. Were you given any other equipment on that occasion?—A. We received our uniforms and shovels.

Q. What kind of uniforms did you receive?—A. German uniforms.

Q. Of what kind?—A. Navy infantry.

Q. Navy infantry?—A. That is correct.

Q. And let me ask you, while you had been in training at this place you mentioned near Berlin, had you been in uniform
53 or civilian dress?—A. We were partly in uniform and partly in civilian dress.

Q. On the occasion in Berlin which you are now describing where you received your instructions, were you and the others in your group all in uniform or civilian dress?—A. Civilian clothes.

Q. Now, sir, I show you a photograph and ask you do you recognize the material that is depicted there?—A. No.

Q. That is a photograph of some boxes. I ask you to examine it. Have you seen boxes similar?—A. That is correct. Boxes similar.

Q. But you cannot say whether those are the identical boxes that you saw or not?—A. Absolutely not.

Q. And where did you see boxes which looked like those?—A. in Berlin.

Q. And that is the way the boxes of explosives you were given looked?—A. They looked similar.

Q. At the time they were given to you?—A. At the time they were given to me.

Mr. CORREA. I ask to have that photograph marked as the next exhibit for identification.

(Marked "Government's Exhibit 11" for identification.)

Q. Now, sir, what was contained in those boxes at the time you received them? Will you indicate as closely as you are able to recall?—A. The boxes contained blocks of explosives wrapped in paper.

54 Q. What kind of explosive was in the block wrapped in paper?—A. I could not tell you the chemical combination.

Q. What else was contained in the boxes?—A. Time device fuses, detonators, and fountain pens.

Q. You say fountain pens. What kind of fountain pens?—A. Fountain pens which contained instead of ink, sulphuric acid.

Q. And had you received instructions for the use of such fountain pens?—A. I did.

Q. And what were your instructions as to the use of them?—A. They were used as igniters.

Q. Were those fountain pens to be used alone or in connection with some other?—A. They could be used alone and could be in connection with a pencil.

Q. That is, a pen and pencil set?—A. That is correct.

Q. Did your equipment include any such pen and pencil sets?—A. That is right.

Q. Was there anything else included in your equipment that you recall now?—A. There was a number of different igniters and explosive equipment.

Q. Were any fuse——A. Detonation fuses.

Q. Was there any explosive in a form other than in blocks wrapped in paper?—A. There was one type of explosive made up like a coal block; like a piece of coal.

55 Q. Made in the shape of a lump of coal?—A. That is correct.

Q. I show you this next photograph and ask you do the objects set forth there—are they similar or the same in appearance as some of the material you received?—A. They were similar in appearance.

Q. Similar in appearance to what, sir?—A. To the blocks we received.

Q. You refer to these blocks here [indicating]?—A. That is right.

Q. Were the blocks you received wrapped in paper as these appear to be?—A. Correct.

Q. And when opened did they look as the one opened here looks?—A. That is right.

Mr. CORREA. I ask to have this marked for identification.

(Marked "Government's Exhibit 12" for identification.)

Q. And is that true as well, sir, of the blocks appearing in this other photograph [handing]?—A. It is.

Mr. CORREA. I ask to have that marked as Government's Exhibit 13.

(Marked "Government's Exhibit 13" for identification.)

Q. I ask you the same question with respect to this photograph: are the objects represented there similar in appearance to

56 the materials you received?—A. That is correct; similar.

Q. And that is true as to the blocks again; is that correct?—A. Yes.

Q. And is it true as to this black——A. Coal blocks; yes.

Q. And coils of wire or fuse——A. Fuse.

Q. They are fuses?—A. Detonation fuses.

Q. Can you identify the black coil as a standard fuse?—A. I identify them as similar.

Q. And the white coil as similar to the detonation fuses you received; is that correct?—A. Correct.

Mr. CORREA. I ask to have this marked as the next exhibit.

(Marked "Government's Exhibit 14" for identification.)

Q. I shall ask you to look at this next photograph which I show you, and look closely, if you will, and tell me whether the objects represented there are similar to the objects or the materials which you received?—A. Yes; they are similar.

Q. And you refer particularly to what?—A. To these fountain pen sets.

Q. They seem to include there two pens; or a pen and pencil?—A. Pen and pencil.

Q. Pen and pencil sets.—A. Yes; detonators with fuses; detonators in the wooden blocks.

57 Q. Yes?—A. And lighters for fuses. That is about all.

Q. The object appearing on the extreme left——A. I never saw that.

Q. You never saw anything similar to that?—A. No.

Mr. CORREA. I ask to have this marked for identification.

(Marked "Government's Exhibit 15" for identification.)

Q. I show you this next photograph and ask you is the object appearing therein similar to one of the objects you received?—A. It is similar to a lump of coal; similar to the rocks we received.

Q. You say similar to a lump of coal?—A. Yes.

Q. Was the rock you received really a lump of coal?—A. It was not.

Q. What was it?—A. It was explosives.

Q. Made up to resemble a lump of coal?—A. Correct.

Q. Did the ones you received have a hole in them as appears in the one photographed here?—A. That is correct.

Q. What is the purpose of the hole in it?—A. To put a detonator in.

Mr. CORREA. I ask to have this marked as the next exhibit.

(Marked "Government's Exhibit 16" for identification.)

Q. Now would you take this batch of photographs and
58 just tell us as to each one whether or not the articles depicted there resemble any of the articles which you received on this occasion in Berlin which you have described?—A. This first picture resembles fuses; of course I cannot tell if they are the same fuses we had, but similar.

Q. They look like the ones you were given; is that the point?—A. That is right.

Mr. CORREA. May that be marked for identification.

(Marked "Government's Exhibit 17" for identification.)

The WITNESS. This looks like a detonation fuse.

Mr. CORREA. I ask to have that marked.

(Marked "Government's Exhibit 18" for identification.)

59 The WITNESS. This [handing to counsel] resembles different types of detonators and igniters.

Q. Showing me the next photograph, you say different types of detonators and igniters.—A. This [handing counsel] is an electric igniter. A picture of detonators protected by a wooden block.

(Photographs marked for identification "Government's Exhibits 18 and 19.")

Q. You say this photograph is an electric igniter [indicating]?—A. That is correct.

Mr. CORREA. I ask that it be marked "Exhibit 20" for identification.

(Marked "Government's Exhibit 20" for identification.)

Q. You say this photograph [indicating] is a picture of what?—A. Detonators protected by wooden blocks.

Q. You mean they were set in these wooden blocks?—A. Yes.

Q. Is that the form in which you received detonators?—A. That is correct.

Mr. CORREA. I ask that this be marked "Exhibit 21" for identification.

(Marked "Government's Exhibit 21" for identification.)

The WITNESS. Electric igniters [handing counsel].

Q. This is a picture of an electric igniter?—A. That is right.

60 Q. Similar to the kind you received?—A. Similar.

Mr. CORREA. I ask that it be marked "Exhibit 22" for identification.

(Marked "Government's Exhibit 22" for identification.)

The WITNESS. That [handing to counsel] is a number of time clocks—similar.

Q. Are these clocks so made that they can be used in connection with detonators and fuses?—A. Yes.

Q. For time explosion?—A. That is correct.

Mr. CORREA. I ask that that picture last identified by the witness be marked "23" for identification.

(Marked "Government's Exhibit 23" for identification.)

The WITNESS. This [handing to counsel] is a time device.

Q. These cartridges, as they appear to be, are time devices?—A. Time devices.

Q. And the writing appearing on the top of the box pictured in the photograph refers to what, sir?—A. To the time. 70 minutes times.

Q. And you received similar boxes of time devices?—A. I received this same box.

Q. This you recognize as being the same box?—A. As the same box; that is correct.

Q. How do you recognize that, sir?—A. By the writing.

61 Q. By the writing appearing on the box "70 minuten"?—A. Yes.

Mr. CORREA. I ask that this be marked 24 for identification.

(Marked "Government's Exhibit 24" for identification.)

The WITNESS. Containers of sulphuric acid [handing photograph to counsel].

Q. Referring to this photograph you have just referred to now, as picturing containers of sulphuric acid, the containers are these objects [indicating]?—A. Yes, and those [indicating].

Q. Is that the way they were packed, in this white material?—A. That is it.

Q. That was contained in the two boxes; is that correct?—A. That is correct.

Mr. CORREA. I ask that they be marked Exhibit 25 for identification.

(Marked "Government's Exhibit 25" for identification.)

Q. And this next photograph you say is a close up of one container of sulphuric acid?—A. Yes.

Mr. CORREA. I ask that that be marked Exhibit 26 for identification.

(Marked "Government's Exhibit 26" for identification.)

Q. And this last photograph which I have handed to you?—A. Our pen and pencil sets which we had along.

62 Q. And those are the pen and pencil sets for incendiary use, which you described before? is that correct?—A. That is correct.

Mr. CORREA. I ask that that be marked Exhibit 27 for identification.

(Marked "Government's Exhibit 27" for identification.)

Q. Now, sir; you have told us that you were given uniforms on this occasion. Is that correct?—A. That is correct.

Q. And that the uniforms were as you said the navy infantry uniforms?—A. Correct.

Q. I show you this cap [handing to witness], and ask you is that the type?—A. Yes.

Q. The kind of uniform cap which you received?—A. That is right.

Q. Can you tell whose cap that is by looking at it?—A. I cannot tell you in that.

Q. Did you all receive caps of that kind?—A. We did receive caps of that type.

Q. I show you four other caps [handing to witness], and ask you are they, too, caps of the same kind? You may look at them.—A. Exactly the same type.

Mr. CORREA. If your Honor please, I should like to mark this last group of four caps for identification, and with the

63 consent of counsel for the defendant I should like to substitute for them a photograph of them, inasmuch as the original exhibits themselves are not available to us for use beyond today.

Mr. MEDINA. I have no objection to any substitution of photographs for the originals, but I think, as your Honor must have gathered from my opening statement, our position is that this issue has been removed from the case. And I shall not object to a description within reasonable bounds, by this witness, of their mission and how they came over here, and what they planned to do. I think that is strictly relevant and admissible within reasonable bounds. I shall object to the use of a lot of exhibits, that the foundation seems to be now attempted to be laid with respect to, on the ground that the issue is substantially not in the case. They will in my judgment be prejudicial to the defendant, they will divert the attention of the jury from the real issues, and a multiplication of that sort of thing passed around among the jury and examined and thought of from moment to moment I really do not think will be fair to the defendant. As I say, I will consent to the use of photographs. I intend to do everything I can to facilitate within reasonable bounds, but I do not want that concession to be misunderstood.

64 Mr. CORREA. If your Honor please, so far as this group and this evidence is concerned, it is the Government's position that the Government is entitled, and indeed is under a burden of showing, as it has charged, that the men who, according to our charge, gave aid and comfort were in truth and fact enemies, and what kind of enemies they were. It seems to me any person who knowingly gives aid and comfort to an enemy of the United States in time of war does so at his peril. He cannot subsequently come and say, "Well, I knew he was an enemy, but I didn't know he was exactly that kind of an enemy. I thought he was some other kind of enemy."

The COURT. I understand there is no objection to the photographs of the caps.

Mr. MEDINA. No; and I may say, your Honor, what Mr. Correa has mentioned is not our point at all. We admit, and as I tried to in my opening indicate, the relevancy of showing that they had this mission and that they came over to do it. We do not deny the relevancy of that. It is the repetition, the rubbing of it in, and the elaboration of it, in view of our concession.

The COURT. I do not think, Mr. Medina, there has been any elaboration so far.

Mr. MEDINA. No; I did not say there had been.

The COURT. If that takes place I will meet it.

65 Mr. MEDINA. Yes; I only made the point because I was making a concession as to the use of the photographs, and I did not want that concession to be misunderstood. That is all, your Honor.

Mr. CORREA. May these four caps, then, last identified by the witness, be deemed marked for identification.

(Deemed marked "Government's Exhibit 28" for identification.)

Mr. CORREA. May the one cap be marked 29 for identification, also identified by the witness.

(Marked "Government's Exhibit 29" for identification.)

Mr. MEDINA. Those are just offered for identification, as I understand it?

Mr. CORREA. At this time they are not offered in evidence. That is correct.

By Mr. CORREA:

Q. Were you given any other equipment at this time in Berlin, besides the caps and the explosives which you described?—A. We received uniforms.

Q. Well, the uniforms of course.—A. We received also some shovels.

Q. For what purpose were those given to you?—A. Our instruction was immediately after landing to bury the boxes with explosives on the shore. For that purpose we received shovels.

Q. I show you this object—which I will ask to have deemed marked Government's Exhibit 30 for identification—and ask you do you recognize that, sir, (handing to witness)?—A. I do.

Q. Is that one of the shovels you received?—A. That is correct.

Q. How do you identify that particular shovel, sir?—A. Because I made the rope around it, I attached the rope, and in addition it is the exact type.

Q. You attached the rope or cord here?—A. That is correct.

Q. And you recognize it that way?—A. Yes, sir.

Q. And you said in addition what?—A. It was the exact type of shovels we received. It is rather an unusual type.

Mr. CORREA. Will these still be deemed marked, without the tags attached to them Government's Exhibits 31 and 32.

(Deemed marked "Government's Exhibits 31 and 32" for identification.)

Q. I show you Government's Exhibits 31 and 32 (handing to witness), and ask you, sir, are those shovels similar?—A. That is correct.

Q. To the ones you received?—A. That is correct.

Q. You are not able to identify them as being among the shovels handed to this group; is that correct?—A. That is right.

Q. Is that a German army shovel?—A. I don't know. I don't think so. It is not a standard type anyway.

Q. How many shovels were given to the entire group?—A. Four.

Q. Were you at this time or at any time split into two groups?—A. Before we left Berlin we were split into two groups.

Q. Was that before or after you were given this equipment, sir?—A. That was before.

What was the make-up of the two groups?—A. The first group consisted of George Dasch as leader of the first group, Heinck, Quirin and myself, as members of this group; and the second group consisted of Kerling as the leader, Haupt, Thiel and Neubauer.

Q. And the second group included Werner Thiel; is that correct?—A. Werner Thiel.

Q. And Kerling was the leader of it?—A. That is correct.

Q. For example, as to the shovels, how many shovels were given to each group?—A. Two.

Q. And how many boxes of explosives, if you recall?—A. Four. Four boxes to each group.

68 Q. Were you given anything else at Berlin before you left for Paris in connection with your assignment?—A. To the groups, you mean? Or to myself personally?

Q. To the individual members of the groups.—A. No.

Q. You said you left Berlin then for Paris; is that correct?—A. That is correct.

Q. Will you just tell us what you did from there?—A. From Paris we went to Lorient.

Q. Where is that located, sir?—A. That is on the French coast. Lorient, and we finally went on to a submarine.

Q. Before you come to that, while you were at Lorient did you receive anything further in connection with your mission?—A. In Lorient we received final instructions and money.

Q. And money?—A. That is right.

Q. In what form did you receive the money?—A. I myself did not receive any money at the time. I was shown money but did not receive it. But the second group received their money in Lorient before they left.

Q. Were you present when the second group—that was Kerling's group, was it?—A. That is right.

Q. Received their money.—A. I was present.

Q. In what form was the money given to them?—A. They had—we all had money belts which contained around $5,000

69 each. Besides that the second group received each man about $400 in small denominations.

Q. And you were present when those money belts with the money in them were handed to the second group?—A. That is correct.

Q. What was done in the case of your group?—A. We received our money on the submarine.

Q. When did you receive your money belts?—A. Before we landed. One day before we landed.

Q. You received the money in the belts; is that correct?—A. That is right.

Mr. CORREA. I will ask that this object be deemed marked Exhibit 33.

(Deemed marked "Government's Exhibit 33" for identification.)

Q. I show you Government's Exhibit 33 for identification [handing to witness], and ask you if you can tell me what that is?—A. It is one of the money belts we received. In fact it is my own.

Q. You can identify that as being your own money belt, sir?—A. Yes.

Q. How do you identify this as being your own money belt?—A. Because I signed it with my initials.

Q. Will you point that out to me?—A. [Witness indicates.]

Q. Referring to the initials "E. P. Bu"; is that correct?—A. That is correct.

70 Mr. CORREA. I ask to have this next one marked for identification Government's Exhibit 34.

(Marked "Government's Exhibit 34" for identification.)

Q. I show you Government's Exhibit 34 for identification, and ask you is that a money belt of the same kind and type as was given to the members of Kerling's group?—A. Yes, it is a money belt about the same type.

Mr. CORREA. I will ask to have this other one marked Government's Exhibit 35 for identification.

(Marked "Government's Exhibit 35" for identification.)

Q. I show you Government's Exhibit 35 for identification [handing to witness], and ask you is that another money belt of the same kind and character as was given to the members of Kerling's group?—A. It is a money belt of the same type.

Mr. CORREA. If your Honor please, with respect to the exhibit which has been deemed marked "Government's Exhibit 33" for identification, which is the money belt that the witness has identified as being his own by his initials which he placed thereon——

Q. By the way, Mr. Witness, when did you place those initials on the belt?—A. In Berlin.

Mr. CORREA. Again I should like to ask that we be permitted to substitute a photograph of this belt.

71 Mr. MEDINA. We will be very glad to make that concession, your Honor.

Mr. CORREA. We will have a photograph made, Judge, which

we will ask to have marked 36 for identification when it is made. It will be here this afternoon.

The COURT. This Exhibit 35, what is that?

Mr. CORREA. It is another money belt, your Honor. There are three money belts marked for identification.

The COURT. Are 34 and 35 similar?

Mr. CORREA. 34, 35, and 33 are similar, Judge, and have so been identified by the witness.

Q. Now, sir, you stated that you departed from Lorient by submarine; is that correct?—A. That is correct.

Q. Which group left first?—A. Kerling's group.

Q. Did you see them go?—A. No.

Q. Where were you staying at the time?—A. We stayed at a hotel.

Q. And did you see them leave the hotel?—A. I did.

Q. Did you and the members of your group give them any assistance?—A. Yes, we did.

Q. In what connection?—A. We helped them carry down the equipment and we said goodbye to them.

72 Q. And did you see them again after that?—A. I did.

Q. In this country?—A. Yes, sir; I did.

Q. And that was the next time you saw them, is that correct?—A. That is correct.

Q. So when did your group leave?—A. On the 28th.

Q. Of May?—A. May.

Q. Will you tell us what you did?—A. Pardon me?

Q. Will you tell us what you did?—A. Why, we also left the hotel, boarded the submarine and left Laurient.

Q. What happened next?—A. On the night of the 13th of June we landed on the shore of Long Island.

Q. How did you effect your landing?—A. By a small rubber boat which brought us from the submarine to the shore.

Q. Did you also row your equipment ashore?—A. That is correct.

Q. And what did you do then?—A. We took our boxes and equipment out of the boat, buried the boxes in the sand on the shore and changed our clothes and finally went to the railroad station at Amagansett and left for Jamaica.

By the COURT:

Q. What time of the day or night did you reach the Long Island shore?—A. On the night of the 13th of June.

Q. About what time?—A. Between twelve and one o'clock at night.

73 By Mr. CORREA:

Q. You mean twelve or one of the 13th, sir? You mean the early morning of the 13th or early morning of the 14th?—A. The early morning of the 13th, I believe.

Q. You say after landing and burying this material you proceeded to Jamaica?—A. Correct.

Q. And how were you dressed at that time?—A. In civilian clothes.

Q. Which you had brought with you?—A. Which I had brought with me.

Q. And that was true of the other members of your group?—A. That is correct.

Q. And what did you do in Jamaica?—A. We bought new clothes because our suits were soaking wet, and proceeded to New York.

Q. Subsequently were you apprehended by the Federal Bureau of Investigation?—A. That is correct.

Q. And when were you apprehended?—A. On the 20th of June.

Q. Were you subsequently brought to trial?—A. Correct.

Q. At Washington, D. C.?—A. Yes.

Q. Before a military commission?—A. That is right.

Q. Did you see any of the other eight there on that occasion?—A. I did.

Q. Who was there?—A. All of us.

74 Q. That is, all of the other seven, rather?—A. That is correct.

Q. Was that the first time you had seen the members of Kerling's group since they left France?—A. That is correct.

Mr. CORREA. You may inquire.

Mr. MEDINA. No questions.

LEON G. PRIOR, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CORREA:

Q. What is your occupation, Mr. Prior?—A. I am a special agent of the Federal Bureau of Investigation.

Q. Referring to July of 1942, to what office were you assigned?—A. Miami, Florida.

Q. Did you on or about July 1, 1942, receive certain instructions—A. I did.

Q. From whom did you receive them, sir?—A. Assistant Director E. J. Connolly.

Q. After receiving those instructions what did you do?—A. I proceeded to Jacksonville, Florida, and from Jacksonville to a point south of Ponte Vedra Beach, approximately four and one-quarter miles.

75 Q. When you arrived at this point four and one-quarter miles south of Ponte Vedra Beach, what did you do there, sir?—A. I dug in the sand.

Q. And when you dug in the sand at this point what did you find, anything?—A. I uncovered four German marine caps and two trench shovels.

Q. I show you a Government's exhibit, which has been deemed marked "Government's Exhibit 28" for identification, of four caps, and ask you are those the caps you found on this occasion?—A. These are the four caps that I uncovered at the Ponte Vedra Beach.

Q. I show you Government's Exhibits marked for identification 31 and 32, and ask you are those the shovels you say you found?——A. Yes. These are the two shovels that I uncovered at the same spot.

Mr. CORREA. You may inquire.

Mr. MEDINA. No questions.

D. J. PARSONS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CORREA:

Q. Your occupation, Mr. Parsons?—A. I am a special agent of the Federal Bureau of Investigation.

Q. How long have you been such, sir?—A. Approximately nine years.

76 Q. And to what office or department of the Bureau are you assigned?—A. I am assigned to the technical laboratory of the Bureau.

Q. Sir, what kind or type of work are you engaged in doing in the technical laboratory of the Bureau?—A. My duties consist of the examination of evidence received in criminal cases, particularly with reference to evidence including explosives, sabotage devices and similar materials, and so forth.

Q. And what, again speaking generally, kinds and types of examinations and analyses of such evidence do you make?—A. They consist of chemical analyses, microscopic examinations and physical tests of the material.

Q. How long have you been engaged in that work?—A. My entire period of service with the F. B. I.

Q. And prior to entering the F. B. I. did you have scientific

training of any kind, sort or character?—A. I did. I graduated with the degree of Bachelor of Science in Chemistry from the Georgetown University.

Q. And during your term of service with the F. B. I. have you made any other studies?—A. I have. In connection with my interest in explosives and similar materials I have consulted and worked in other laboratories for explosives, testing grounds, and so forth.

77 Q. I show you a series of photographs which have been marked "Government's Exhibits 12, 14, 15, 13, 11, 16, 25, 26, 27, 17, 20, 19, 18, 21, 22, 23, and 24" for identification, they all being photographs, and I ask you to examine those photographs and tell me whether or not you have seen the material depicted therein before?—A. I have seen all of this material before and these photographs were taken under my supervision.

Q. Where first did you see that material, sir?—A. On the Florida beach, 4.3 miles south of Ponte Vedra.

Q. And was that material dug out of the sand at that point?—A. It was.

Q. Were you present when it was dug out of the sand?—A. I was.

Q. Who was present on that occasion?—A. Edward Kerling, assistant director E. J. Connolly, and other agents of the Federal Bureau of Investigation.

Q. Prior to the material being dug out of the sand had Edward Kerling done anything?—A. He had.

Q. Will you tell us what he had done?—A. He led us from the road to a spot just off the beach and indicated to us a spot in the sand at which point we uncovered the boxes of explosives.

Q. Now, you referred to Edward Kerling. I show you a photograph which has heretofore been marked "Government's Exhibit 5" for identification and ask you whether or not that

78 is a picture of the man to whom you refer as Edward Kerling [handing]?—A. Yes, sir.

Mr. CORTEN. Now, if your Honor please, in connection with the further testimony of this witness concerning these materials, I should like to offer at this time these photographs 11 to 27 for identification, in evidence.

Mr. MEDINA. May it please the Court, I should like to state our position as to this. We object to them and we will object, as I indicated in my opening, to similar proof, and with your Honor's permission I should like to elaborate the basis for my objection.

The COURT. I think I understand it. You have made the point before.

Mr. MEDINA. Well, we do not wish to urge it except on general terms, if your Honor does not wish me to, but I think it a rather important point from the standpoint of the defense, and if you think that elaboration of it in the presence of the jury might be prejudicial to the Government I shall be very glad to have the jury withdraw.

The COURT. I do not know whether it would be prejudicial to either side or helpful to either side. I look at it as a question of law.

Mr. MEDINA. All I wish to do is place my point on the
79 record, your Honor, and I don't want to do it in a way that is in any sense objectionable. On the other hand I do think it is important and my right to place the position that we have plainly on the record so that I may not need to be getting up again and again when a similar thing is produced.

The COURT. You may do so. State the grounds of your objection. I don't think we need to go into an extended argument.

Mr. MEDINA. And I shall not do that. Now we object to them as incompetent, irrelevant and immaterial——

The COURT. I would suggest that you just state your grounds simply.

Mr. MEDINA. I shall try to, your Honor: we object on the ground that the evidence is irrelevant, immaterial, and incompetent, and specifically upon the ground that in view of the concession made here, and in view of the proof by the witness Burger, which would seem to cover the field thoroughly and comprehensively, we believe that evidence as to such details as appear in these photographs and other similar evidence that may be produced a little later, will have an amount of effect out of all proportion to its true judicial worth and will be prejudicial to the defendant; it will confuse the issues and it will get, inevitably, the minds of the jurors away from what is the central and
80 simple issue, and is bound, particularly when accumulated here, to do so. We have a large number of photographs; there are many other things of a similar character that will be produced, and the effect of all that will be to accumulate, as it seems to us, prejudicial matter on the grounds that I have stated.

And, of course, as Mr. Minton calls to my attention, too, there is no pretense or claim that the defendant had anything to do with these matters. He came in, according to the concession made by Mr. Correa in his opening, at a later time. If there were some contention that he was connected with this scheme or this plot, it would be different, but there is no such claim.

Mr. CORREA. If your Honor please, I should like to reply particularly to that last, which I think is a misapprehension of the Gov-

ernment's position. First, the material is offered at this time, subject to connection it is true, in that we will establish that this is the material which was brought over by the group of which Edward John Kerling and Werner Thiel were members, and we will connect specifically Edward John Kerling and Werner Thiel with the defendant Cramer as being the enemies of the United States that Cramer aided. I might point out that at the very time Cramer was aiding these enemies of the United States; this material was secreted, as the proof of this witness shows, in the sands of Florida, and secreted there for use by the self-same enemies of the United States, Werner Thiel and Edward John Kerling, who, as our proof will demonstrate, the defendant Cramer was aiding.

I submit there is no concession whatever by the Government, far from it, that Cramer is not connected with this plan. Our contention is that Cramer is very closely identified with the plan in giving aid and comfort to the men who put this material here with the intention of using it.

Mr. MEDINA. If your Honor please, Mr. Correa's statement is exactly what I claim he said. They do not claim Mr. Cramer had any part in this planning over in Berlin, or had any contact with these men as they got off of this submarine or participated in the plot and scheme there. Mr. Correa merely claims that later Mr. Cramer had to do with Thiel and Kerling in New York; not that he had any participation in any of this plot, and so we most earnestly urge the objection upon your Honor.

Mr. CORREA. I point out, if your Honor please, that at the time Cramer had to do with Thiel and Kerling in New York, what counsel chooses to call a plot or plan, whatever he wishes to call it was still under foot. The very material we are discussing here, and we are not discussing something in Berlin but in the sands on the coast of Florida, waiting there to be used; neither Kerling nor Thiel had been apprehended and the gravamen of Cramer's offensive was in that he aided and comforted them in furtherance of that purpose which was to use this material, and I think we are entitled to show what the material was and how it could be used.

The COURT. I think they should be received, Mr. Medina.

Mr. MEDINA. I respectfully except.

The COURT. There is one point I would like a little explanation about. You objected on the ground that they were incompetent. Did you mean there was a lack of proof?

Mr. MEDINA. No, I do not object on the ground that the photographs have not been properly identified. I might well object upon that ground but I do not. I do not raise any such point as that.

The COURT. Then there is nothing in your objections on the ground that they are incompetent.

Mr. MEDINA. Well, I use that general phrase that we lawyers are so accustomed to, just as a sort of catchall; but with no endeavor to raise the technical question of lack of identification of the photography.

The COURT. I did not want to be caught in that category.

83 Mr. MEDINA. No. I would never have claimed any such thing as that.

Mr. CORREA. I take it it is understood, Judge, because this is one case where I think we are disabled from bringing the original exhibits here.

Mr. MEDINA. May I note my exception to your Honor's ruling.

(Government's Exhibits 11 to 27 inclusive for identification received in evidence.)

(Short recess.)

By Mr. CORREA:

Q. Now, sir, one question first: you said the point at which you found this material was about 43 miles——A. 43 miles.

Q. From Ponte Vedra?—A. From Ponte Vedra beach.

Q. How far was it from Jacksonville, Florida?—A. Just a little over thirty miles.

Q. And after the material was found on the beach did you there, or subsequently at some other place, make a further examination of it?—A. I did.

Q. And did you make an examination with a view to ascertaining the quality and nature of the materials found there?—A. I did.

Q. By the way, in what form was the material at the time you found it? That is, was it packaged in any way?—

84 A. It was. All of the material was contained in four wood boxes which were bound with metal strips.

Q. And you subsequently made an analysis of that at the laboratory, is that correct?—A. I did.

Q. Will you tell us generally what materials there were in there; that is, if you would list the kinds of materials that were contained in these four boxes or packages?

Mr. MEDINA. I renew the objection that I made a few moments ago, your Honor, on the same grounds.

The COURT. The same ruling.

Mr. MEDINA. Exception.

A. There were in the four boxes blocks of trinitro toluol, or TNT, as it is familiarly known, which is a high explosive, blocks containing explosions made to simulate lumps of coal, safety fuse, a standard fuse which is used to set off explosions; detonating

fuse, which is used to connect charges of explosives that are to be set off simultaneously; detonators of several kinds, those set off electrically, as well as detonators to be set off by fuse; adapters to permit the use of the fuse with other detonators or incendiary igniters; there were small incendiary devices or incendiary igniters; fuse lighters, small instruments used to ignite the safety fuse; wood blocks containing detonators both of the standard type and of a special type which were threaded; electrical devices for setting off the special detonators; timing devices, both mechanical and chemical; time devices constructed or concealed as pen and pencil sets, and a paper pen containing an abrasive mixture.

Q. Could you tell us approximately how many blocks of TNT were included in this material?

Mr. MEDINA. May it please the Court, may I be deemed to have objected to this entire line so that I will not have to interrupt?

The COURT. Yes; Mr. Medina.

Mr. MEDINA. Thank you. And I respectfully except to your Honor's ruling.

A. There were 46 blocks of the TNT, each block weighing one kilogram, or approximately 2.2 pounds.

Q. I think you mentioned that there were blocks; was this TNT made in the form of a lump of coal?—A. In addition to the 46 demolition blocks of TNT there were four of the so-called coal blocks containing TNT.

Q. And what were they made of besides the TNT?—A. The explosive side of the TNT was covered with a black plastic material to give it the appearance of a lump of coal.

Q. Now you mentioned various detonators and incendiary devices?—A. Yes.

Q. Can you tell us approximately how many there were of each type?—A. Yes; there were 25 electric detonators; that is, small metal tubes filled with a charge of a violent explosive which is set off by connecting them to a battery or other source of electrical energy. There were 75 fuse type detonators which were contained in wood blocks which were sealed. There were 50 detonators of a special type which were threaded to permit their use with a chemical or mechanical timing device, and there were 25 threaded igniters or incendiary devices contained also in wood blocks.

Q. I will show you Government's Exhibit 11 and ask you if that is a photograph of the containers or of the material as you found it?—A. This is a photograph of the four boxes before opening, and after they were removed from the beach.

Mr. CORREA. May the jury see that?

The COURT. That is exhibit what?

Mr. CORREA. Exhibit 11 in evidence, your Honor. [Exhibit handed to the jury.]

Q. Now I show you Exhibits 12 and 13 and ask you what is set forth therein?—A. Photographs 12 and 13 show two of the boxes after they had been opened and the photograph portrays the wood boxes, the metal liners which were soldered or hermetically sealed, and in each photograph 18 T. N. T. demolition blocks which were individually wrapped in paper.

86–A Q. And in each photograph one block appears unwrapped, is that correct?—A. That is correct. [Government's Exhibits 12 and 13 handed to the jury.]

87 Q. I show you Government's Exhibit 14 in evidence [handing to witness] and ask you what is set forth in that picture?—A. This photograph, Government's Exhibit 14, shows the third wood box after it had been opened, the metal liner, ten more of the TNT demolition blocks, the four bombs made to simulate lumps of coal, four coils of safety fuse and one coil of detonator fuse.

Q. Now I show you, sir, Government's Exhibit 15 [handing to witness] and ask what that represents?—A. Government's Exhibit 15 is a photograph showing the fourth box after it had been opened, the metal liner, and the contents, which consisted of the various detonators, igniters, the delay devices, and the abrasive.

Q. And Government's Exhibit 16 [handing to witness]?—A. Government's Exhibit 16 is a photograph of one of the bombs constructed to simulate a lump of coal.

Q. By the way, I note on Government's Exhibit 16 there appears a rule with the notation of 2 inches, in a graduated scale.—A. That is correct. The scale was placed in the photograph to show the size of the coal bomb.

Q. How many such coal bombs were there did you say?—A. There were four in this lot.

88 Q. I show you Government's Exhibit 17 in evidence [handing to witness], which is a photograph of several coils of wire, and ask you what it is?—A. Government's Exhibit 17 is a photograph showing the four coils of safety fuse and the one coil of detonating fuse.

Q. And Government's Exhibit 18 [handing to witness], which is another coil?—A. Government's Exhibit 18 is a photograph of a piece of a detonating fuse, which is also shown in Government's Exhibit 17.

Q. That is a close-up of the same fuse; is that correct?—A. This is a close-up of a piece of detonating fuse; yes.

Q. And Government's Exhibit 19 [handing to witness]?—A. Government's Exhibit 19 is a group photograph of the det-

onators, igniting devices, and accessories contained in the lot of explosive material.

Q. And Government's Exhibit 20 [handing to witness]?—A. Government's Exhibit 20 is a close-up photograph of one of the electric detonators which is shown in photograph Exhibit 19 at the upper center.

Q. The center of these three groups: is that correct?—A. That is correct.

Q. That is a close-up of one of those detonators?—A. It is.

Q. I show you, sir, Government's Exhibits 21 and 22 [handing to witness].—A. Government's Exhibit 21 is a close-up photograph showing one each of the three types of wood blocks which are also shown in Government's Exhibit 19, and these blocks each contain a different type of detonator or igniting device. The block shown in the center contained five—it is one of the blocks containing five commercial type fuse detonators. The block on the right is one of those each of which contained five of the special type threaded detonators, and the block on the left which has been opened is one of those each of which contained five of the special incendiary igniters.

Q. That is Government's Exhibit 21?—A. Yes.

Q. Now Government's Exhibit 22 is a close-up, is it not, of one of these?—A. It is. Government's Exhibit 22 is a close-up photograph of one of the electric matches, which is also shown in Government's Exhibit 19. It is a small device which will accommodate either the threaded detonator or threaded igniter, in order that they may be set off electrically.

Q. And this too is photographed with a rule?—A. It is.

Q. To indicate its size; is that correct?—A. Yes.

Q. Now, Government's Exhibit 23 [handing to witness].—A. Government's Exhibit 23 is a photograph of ten mechanical timing devices one of which is wrapped in paper, the other nine having been unwrapped. In addition there is also shown the box in which these devices were packed, the caps and primers for these time devices, which provide a delay of fourteen days, in setting off a delay explosive or incendiary.

Q. That is, they could be set to explode or ignite a charge fourteen days from the time they were set?—A. Yes sir.

Q. You call them mechanical timing devices. Are they similar to a clock mechanism?—A. A time clock or mechanical time device. Either description is correct.

Q. Now, sir: as to Government's Exhibit 24, which is identified by the witness by some writing appearing on the top of the box depicted there [handing to witness].—A. Government's Exhibit 24 is a box containing ten chemical delay devices, which are small

brass and plastic instruments providing a delay of approximately an hour to 70 minutes. The base of these devices are threaded to accommodate the detonator or incendiary igniter.

Q. You say these provide a delay of an hour to 70 minutes?—A. Approximately that.

Q. Was that notation "70 Minuten" which appears on the top of the box on the box when it was found?—A. It was.

Q. I show you, sir, Government's Exhibits 25 and 26 [handing to witness] and ask you first is it not true that Exhibit 26
91 is a close-up of one of the objects depicted in Government's Exhibit 25?—A. It is.

Q. What were those objects; will you describe them?—A. Government's Exhibit 25 is a group of glass ampules each containing a quantity of sulphuric acid to be used with the chemical delay shown in Government's Exhibit 24; and photograph Government's Exhibit 26 is a close-up of one of these ampules of sulphuric acid.

Q. That is, they are used in connection with the delay devices which you said operated on a 60 or 70 minute period of delay?—A. That is correct.

Q. By the way, referring again to Government's Exhibit 25, does that show the way in which these ampules of sulphuric acid were packed?—A. The photograph shows the box after it was opened. The bottom and top of the box are now empty. The white powder was contained in the boxes as a protective medium for the capsules.

Q. Now, sir, I show you Government's Exhibit 27 [handing to witness] and ask you what the material depicted there is?—A. Government's Exhibit 27 is a group photograph of the five pen and pencil time delay devices which are contained in this equipment.

Q. Would you state, sir, how this pen and pencil set is used. You have told us what its function was, but how were those particular sets usable?—A. It is necessary to combine the
92 pen and pencil in order to use it as a delay mechanism. The cap of the pen is removed and the top and clip of the pencil are also removed. The threads of the pen will then fit into the body of the pencil, and the point of the pencil when removed reveals threads which will accommodate either a detonator or an incendiary igniter. The end of the pen when twisted will start a chemical delay action which varies in this equipment from two and three-quarter hours to 13 hours, depending upon which set is used, and after that period of delay the chemical delay reaction will set off either a detonator or igniter.

Mr. CORREA. You may inquire.

Mr. MEDINA. No questions.

GROVER D. BUSHMAN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Mr. Bushman, what is your occupation?—A. Immigrant inspector, Ellis Island, New York.

Mr. GOODKIND. I would like to have this sheet marked for identification.

(Marked "Government's Exhibit 36" for identification.)

Q. Mr. Bushman, I show you a sheet of paper marked
93 Government's Exhibit 36 for identification [handing to witness] and ask you whether that was furnished by you pursuant to subpoena?—A. It was; yes.

Q. Is that an official record of your bureau?—A. Yes, sir.

Q. That is a form supplied by the Immigration and Naturalization Service?—A. A form supplied to the Immigration and Naturalization Service. The form; yes; it is.

Q. Is that maintained by your bureau in the regular course of business?—A. It is.

Q. Does this record contain any entry relating to Edward Kerling?—A. It does; yes.

Q. What kind of record is this, Mr. Bushman?—A. It is the outward bound manifest of the particular steamer.

Q. What does an outward bound manifest show?—A. It shows the names of the passengers who sailed on the vessel in question.

Q. Together with other information?—A. Yes.

Mr. MEDINA. I make no objection to this as far as it goes, your Honor. It does refer to an Edward Kerling, which may well be the same man; and I do not know whether it may be connected up later on or not, but so far as it goes we raise no objection, and we will take under advisement whether in the event it should not be
94 connected we will make a motion to strike. I make the same statement so far as there is an entry with reference to Neuhauer, one of the other men referred to by the witness Burger.

Mr. CORREA. I offer this in evidence, Government's Exhibit 36 for identification.

(Government's Exhibit 36 for identification marked in evidence.)

Mr. MEDINA. I may say for the entire trial as far as the substitution of photostats for exhibits we make a blanket concession as to that. If it should turn out, as it may, as to one or two, that the photostats show the thing so faintly as not to be entirely clear, I am sure we will have no difficulty in working out some appropriate machinery for doing that. So that they need not ask me each time about the substitution of the photostat for the original.

By Mr. GOODKIND:

Q. Mr. Bushaman, Government's Exhibit 36 in evidence you described as an outgoing manifest?—A. Yes, sir.

Q. Listing passengers for what steamship?—A. For the steamship "Exochorda."

Q. On what date?—A. Departed from New York July 11, 1940.

Q. Bound for?—A. Bound for Lisbon, Portugal.

Q. Is this a true record of the boat as it was received
95 by your office?—A. It is. It shows received August 5, 1940.

Q. Is that a time stamp of your office?—A. It is.

Q. Will you point out to me the entry relating to Edward Kerling?—A. No. 16 on the first sheet.

Q. Is there also an entry relating to a Herman Neubauer?—A. No. 11; yes.

Mr. GOODKIND. With the Court's permission I will read the entry relating to Edward Kerling.

(To jury:) This manifest shows that passenger No. 16, Edward Kerling, age 31, male, citizen of Germany, departed on the steamship "Exochorda" on July 11, 1940, from New York bound for Lisbon, Portugal. It states that the "Country where you are going to live permanently" is Germany, that he was born in Germany, that he lived in Germany before coming to the United States, that he last arrived in the United States in February 1936 at New York. It shows that he is German, and he claims divers occupations, and that he is married.

With the consent of counsel for the defendant we will substitute a photostat of this page for the exhibit.

I would like to have this page marked for identification.

(Marked "Government's Exhibit 37" for identification.)

96 By Mr. GOODKIND:

Q. Mr. Bushman, I show you a bound sheaf of papers, and indicate to you one of those sheets, a double sheet marked "Government's Exhibit 37" for identification [handing to witness], and I ask you whether that was also furnished by you pursuant to subpoena?—A. It was; yes.

Q. Is that also an official record of your bureau?—A. It is.

Q. And a record maintained by the Immigration and Naturalization Service in the regular course of business?—A. Yes, sir.

Q. What kind of a document is that?—A. It is a manifest; a passenger manifest of an incoming boat.

Q. That is an incoming manifest; is that right?—A. Yes; that is true.

Q. Is that sheaf of papers one manifest?—A. It is; yes.

Q. And the indicated page lists some of the passengers; is that right? The page marked for identification.—A. That is true.

Q. Does this page marked "Exhibit 37" for identification contain an entry relating to an Anton Cramer?—A. It does; yes.

Mr. MEDINA. No objection.

Mr. GOODKIND. I will offer Government's Exhibit 37 for identification in evidence.

97 (Government's Exhibit 37 for identification marked in evidence.)

Q. Mr. Bushman, Government's Exhibit in evidence 37 is a page from an incoming manifest of what steamship?—A. The steamship "Ohio."

Q. Arriving where, on what day?—A. Arriving at the port of New York, July 27, 1925.

Q. Will you indicate to me the entry relating to Anton Cramer?—A. No. 5.

Mr. GOODKIND. With your Honor's permission I will read part of the entry to the jury.

(To jury:) This is a manifest of the steamship "Ohio," arriving at New York from Hamburg on July 27, 1925. It indicates that No. 5 on this page of passengers is Anton Cramer, age 24, a farmer, a national of Germany and a German. His last permanent residence Allendorf, Germany, his mother Maria Cramer; that he is bound for Iowa and is entering as a permanent resident; that he bears an immigration visa given to him at Cologne No. 12798 on the 3rd day of May 1925.

With the leave of the Court I will substitute a photostat of these pages.

(Sheet marked "Government's Exhibit 38" for identification.)

Q. Mr. Bushman, Government's Exhibit for identification No. 38, is that also a record furnished by you pursuant to

98 subpoena?—A. It is; yes.

Q. Is that an official record of your bureau?—A. It is.

Q. Maintained in the regular course of business?—A. Yes, sir.

Q. What kind of record is that?—A. This is also an outward bound passenger manifest.

Q. Does that contain any entry relating to an Anton Cramer?—A. It does.

Mr. MEDINA. No objection, your Honor.

Mr. GOODKIND. I offer Government's Exhibit 38 for identification in evidence.

(Government's Exhibit 38 for identification marked in evidence.)

Q. Mr. Bushman, this Exhibit 38 in evidence again is a sheaf of papers. Does that constitute one manifest?—A. It does.

Q. And the particular page which has been marked lists some of the passengers; is that correct?—A. That is true; yes.

Q. For what steamship is this a manifest?—A. This is the steamship "Bremen."

Q. Departing from what port?—A. Departing from New York, June 14, 1936.

Q. And will you point out to me the entries relating to Anton Cramer?—A. [Witness indicates.]

Mr. GOODKIND. With your Honor's permission I will indicate that to the jury.

Mr. MEDINA. I take it, your Honor, these last two exhibits are only offered and received insofar as there are entries relating to Mr. Cramer.

Mr. GOODKIND. That is correct.

(To jury:) The entry shows that amongst the third class passengers on the steamship "Bremen" sailing from New York, June 14, 1936, bound for Bremen, Germany, is the passenger Anton Cramer, 35 years old, male, a citizen of Germany but a permanent resident of the United States, born in Germany and lived in Germany before coming to the United States, who last arrived in the United States in 1925. It indicates that he is a German; an engineer by occupation.

Again with the assent of counsel I substitute a photostat of this page.

The COURT. That shows that he returned to Germany in 1936; is that it?

Mr. GOODKIND. Yes, your Honor; indicating on the record that the country where he will live permanently is the United States.

The COURT. Was that a round trip?

Mr. GOODKIND. The next half of it is coming up.

The COURT. The next shows his return to this country?

Mr. GOODKIND. This record merely shows the departure. I now ask the clerk to mark this paper for identification.

(Marked "Government's Exhibit 39" for identification.)

By Mr. GOODKIND:

Q. Mr. Bushman, I show you Government's Exhibit 39 for identification [handing to witness] and ask you whether that is a record furnished by you pursuant to subpoena?—A. Yes, sir.

Q. Is this also an official record of the Immigration and Naturalization Service?—A. It is; yes.

Q. Is it maintained by your bureau in the regular course of business?—A. Yes, sir.

Q. What kind of a document is this?—A. This is an incoming manifest; passenger manifest of the steamer.

Q. Is the whole sheaf one manifest?—A. The whole bound.

Q. The bound sheaf of papers is one manifest?—A. Yes.

Q. And the double page which has been marked has some of the passengers; is that correct?—A. Yes.

Mr. MEDINA. No objection.

(Government's Exhibit 39 for identification marked in evidence.)

Q. Mr. Bushman, Exhibit 39 in evidence is the incoming 101 manifest of what steamship?—A. Of the steamship "Stuttgart."

Q. Sailing from where?—A. Sailing from Bremen.

Q. And arriving?—A. At the port of New York September 12, 1936.

Q. Will you indicate to me an entry relating to Antton Cramer?—A. [Witness indicates.]

Mr. GOODKIND. (to jury). This manifest indicates that among the passengers sailing on the steamship Stutgart from Bremen, Germany, and arriving in New York September 12, 1936, is No. 24, Anton Crafner, 35 years old, an engineer, national of Germany and a German, and born in Germany in Allendorf, coming in with a re-entry permit No. 1099632 over the number 1098814. It indicates that his last permanent residence is Hammond, Indiana; that his brother, Josef Cranier, in Allendorf, Germany, the address where he last was, is his nearest relative, and the country from which he comes. That his final destination is Hammond, Indiana, and that he was in the United States previously during the period 1925 to 1936.

Again with the leave of the Court I substitute photostats of these pages.

You may inquire.

Mr. MEDINA. No questions.

102 ERNEST E. SALISBURY, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Mr. GOODKIND. I ask to have this paper marked for identification.

(Marked "Government's Exhibit 40" for identification.)

Q. Mr. Salisbury, what is your occupation?—A. I am Chief of Certifications Branch in the Immigration and Naturalization Service in Philadelphia.

Q. Is your office in Philadelphia the lodging place for the centralization of records of the Immigration and Naturalization Service?—A. That is correct.

Q. I show you Government's Exhibit for identification No. 40

[handing to witness], and ask you if this is a record furnished by you pursuant to subpoena?—A. That is correct.

Q. Is this one of the records of the Immigration and Naturalization Service?—A. Yes, sir.

Q. Is it maintained by your office in Philadelphia?—A. Yes.

Q. In the regular course of business?—A. Yes.

Q. Does this record relate to one Werner Thiel?—A. Correct.

Q. What kind of a record is this, Mr. Salisbury?—

103 A. That is the immigration visa that was given to——

Q. Well, it is an immigration visa; is that correct?—A. Yes, sir.

Mr. Medina. We have no objection, your Honor, and I may say that as to many of these purely formal matters, I am sure that we could facilitate the Government's case considerably by making any reasonable concession as to formalities and official documents and things of that kind.

The Court. I think that would save quite a lot of time.

Mr. Correa. I think we are about through with them, your Honor.

The Court. Are you?

Mr. Correa. Yes.

Mr. Goodkind. I offer Government's Exhibit 40 for identification in evidence.

(Government's Exhibit 40 for identification marked in evidence.)

By Mr. Goodkind:

Q. Mr. Salisbury, Government's Exhibit 40 in evidence is this an immigration visa furnished to Werner Thiel?—A. That is right.

Q. Does it contain on the back an entry by the immigra-

104 tion officer at the time of the entry of the person bearing the visa?—A. That is correct.

Q. And is this the entry [indicating]?—A. That is the entry.

Q. Does it also bear on the front a picture of the bearer of the visa Werner Thiel?—A. That is correct.

Mr. Goodkind. I indicate to the jury the entry by the officer. The immigration visa bearing the picture of Werner Thiel, an entry on the back thereof by the immigration officer certifying that Werner Thiel arrived in the United States at the port of New York on the 26th day of April 1927 on the steamship *Cleveland*, and was admitted.

If your Honor please, we do not at present have a photostat of this exhibit, but we will have, and when we do we will ask leave of the Court to substitute it.

The Court. That is satisfactory.

Mr. MEDINA. I am not sure that I heard that, but I imagine it is a request to substitute photostats later, and that is all right.

The COURT. Yes, that is it.

Mr. MEDINA. The exhibit I take it will remain here until the photostat is substituted, and even if it is not, it is all right with us.

(Paper marked "Government's Exhibit 41" for identification.)

Q. Mr. Salisbury, Government's Exhibit 41, for identifi-
106 cation, is that also a record furnished by you pursuant to subpoena (handing to witness)?—A. Correct.

Q. Is that also an official record of the Bureau of Immigration and Naturalization?—A. Yes sir.

Q. Maintained in Philadelphia in the regular course of business; is that correct?—A. Yes sir.

Q. What is this document?—A. It is the immigration visa relating to Edward Kerling.

Mr. MEDINA. No objection.

(Government's Exhibit 41 for identification marked in evidence.)

Q. Mr. Salisbury, Government's Exhibit 41, in evidence is an immigration visa furnished to Edward Kerling; is that correct?—A. Correct.

Q. Does it indicate where it was furnished to him?—A. At Cologne, Germany.

Q. Does it bear a picture of the person to carry the visa?—A. Correct.

Q. Does it contain an entry on the back by the immigration officer admitting the person with the visa?—A. It does.

Mr. GOODKIND. With your Honor's permission I will indicate the entry to the jury. (To jury:) Gentlemen of the jury, this
106 is a visa of Edward Kerling bearing the picture on the front, an entry on the back by the immigration officer certifying that Edward Kerling arrived in the United States at the port of New York on March 5, 1929, on the steamship Dresden and was admitted as quota immigrant.

Again with the consent of counsel, at a later date when the photostat is ready I will ask leave to substitute.

Q. Mr. Salisbury, have you made a search of the central records of the Immigration and Naturalization Service in Philadelphia to ascertain whether there are there any entries or any information showing an entry by Edward Kerling to the United States in the year 1940?—A. There is no such record.

Q. And 1941?—A. We can find no such record.

Q. Or 1942?—A. There is no such record.

Q. Have you caused to have made or yourself made a search of the same type relating to Werner Thiel?—A. I have.

Q. Does that search disclose any information indicating that Werner Thiel entered the United States in the year 1940, 1941 or 1942?—A. I can find no such record.

Mr. Murphy. No questions.

107 RICHARD MARTIN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Gerald Martin, are you also known as Pat Martin?—A. Yes.

Q. Pat, how old are you?—A. Fifteen.

Q. Where do you live?—A. 107-17 159th Street.

Q. Where is that?—A. That is South Jamaica Project.

Q. Is that South Jamaica Project, Long Island?—A. Yes.

Q. Do you also work as a shoeshine boy?—A. Yes.

Q. Where do you usually shine shoes?—A. On the corner of 161st Street.

Q. Is that in Jamaica?—A. Yes.

Q. And do you have a box and roam the streets with it?—A. Yes.

Q. Now, Pat, I want to show you two pictures which are Government's Exhibits in evidence 9 and 10. Will you look at those pictures and tell us whether or not you have ever seen the men of whom those are pictures?—A. Yes, I did.

Q. And when was that?—A. That was some Saturday back in June.

Q. And what time of day was it?—A. Morning.

Q. And where were you?—A. Shining on the same corner.

108 Mr. GOODKIND. May the record indicate that the witness has identified pictures which have been previously identified as pictures respectively of Dash and Burger.

The COURT. Are they in evidence?

Mr. GOODKIND. No, they are not, Judge. They are just used for the purpose of identification.

Q. Now, Pat, on this Saturday morning in June, were you alone or was someone with you?—A. Somebody was with me.

Q. Who?—A. Another boy by the name of Donald Boges.

Q. Where did you see the men?—A. On the same street I was shining.

Q. Did you notice anything about their appearance at that time?—A. Yes; their shoes was wet and we asked for a shine.

Q. And did you give them a shine then?—A. No, not then.

Q. Did you see them again?—A. Yes.

Q. And when was that?—A. That was about ten thirty.

Q. And how long after the first time you saw them was the se-

and time?—A. That was about twenty-five minutes after; half an hour.

Q. And did you notice anything about their appearance at that time?—A. Yes, they had new shoes.

Q. And what did they do?—A. They came—they told us to shine them and we shined them.

109 Q. And when you were through shining, what happened, if anything?—A. They left the old shoes there.

Q. They gave you something?—A. Yes, they gave us the other shoes.

Q. They gave you what?—A. The shoes. They gave us the other package.

Q. The package?—A. Yes.

Q. Did you open the package?—A. Yes.

Q. And what did you find in it?—A. I found shoes and socks.

Q. And were they wet or dry?—A. They were wet.

Mr. GOODKIND. You may inquire.

Mr. MEDINA. No questions.

FRED W. SPEER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Mr. Speer, where do you live?—A. Jacksonville, Florida.

Q. What is your occupation?—A. Assistant manager of the Mayflower Hotel.

(Documents marked "Government's Exhibits 42 to 50" inclusive for identification.)

Q. Mr. Speer, I show you Government's Exhibit for
110 identification 42, and ask you whether that is a record furnished by you pursuant to subpoena?—A. It is; yes, sir.

Q. Let me show you this group of exhibits marked for identification 42 through 50, and will you look at each one and tell us whether each one is a record furnished by you pursuant to subpoena?—A. Yes, sir; all of them are.

Q. And are they all records of the Hotel Mayflower?—A. They are.

Q. In Jacksonville?—A. That is correct.

Q. And are these records kept by your hotel in the regular course of business?—A. They are.

Q. I show you Government's Exhibit 42 for identification and ask you what kind of a record that is?—A. That is a registration card we call it; in other words, when a guest comes in the hotel for a room, they have to register on that card.

Q. And I show you Exhibit 43 for identification, and ask you

what kind of a record that is?—A. That is the same thing; a registration card.

Q. And I show you Exhibits 44 and 45 for identification and ask you what kind of records they are?—A. These are what we call rooming slips; that is, made up by me when a guest is sent to the room. It is a record we keep of their baggage and their name and the bellboy.

111 Q. And Exhibit 46 for identification?—A. That is a local telephone call; a charge slip, in other words.

Q. And does that show the room from which the call emanated?—A. That shows the room and the place that was called on there; yes, sir.

Q. I show you Exhibits for identification 47 and 48, and ask you what kind of records those are?—A. One is a bellboy's record that is kept by the bell captain of each boy's errands; that is, he runs upstairs for the rooms and when he comes back we keep a record.

Q. Does it show the room number to which the boy went?—A. Yes; it shows the room number, the boy's number and the type of service he gave.

Q. And does it show anything as to the time when he went to the room and came back?—A. Yes; it does.

Q. And does it bear the date?—A. It bears the date and the time.

Q. And what is Exhibit 48 for identification?—A. That is the bellboy's record sheet. The other is a porter's record sheet. That is the porter's record showing baggage down and that is the record showing baggage up [indicating].

Q. And Exhibits 49 and 50 for identification, what are they?—A. Those are account cards. In other words, the record

112 of the guest's money spent with us, the charges, and money paid us is kept on that.

Q. And does the first entry on such a card indicate the time when a guest checks into the hotel?—A. No; it indicates the date. It does not indicate the time.

Q. And the last entry, does that indicate the date when the guest checks out?—A. That is correct. That is when they pay us and check out and then we time stamp it when they check out.

Q. And does it bear the name of the guest as well as the room number?—A. It bears the name of the room number, the date, and the rate, and the city they are from, and any other information that we need on that account.

Q. Is it the practice of your hotel if two guests come in together to make any entry on their respective cards?—A. I don't understand you.

Q. Is it the practice of your hotel, if two guests come in together but take separate rooms, to make any notation on the ledger card?—A. Well, if they are together, yes, sir; we do.

Q. What kind of notation do you make?—A. What we call cross information. In other words, if two guests have separate rooms, on each card we put "See" the other room on there.

Q. Now, Mr. Speer, I show you a picture which is marked
113 "Government's Exhibit 5" for identification, and ask you whether you have ever seen the man of whom this is a picture?—A. Yes, sir; I have.

Mr. GOODKIND. May the record indicate that the witness identifies a picture which has been identified as the picture of Edward John Kerling.

Q. Where and when did you see this man, Mr. Speer?—A. I saw him shortly after—well, it was about two o'clock, I imagine, on the afternoon of the 17th, the date that the guest known as Haupt and Thomas registered in our hotel.

Q. Where did you see him?—A. He came up to the desk and asked me for the room numbers of Herbert Haupt and Thomas.

Mr. GOODKIND. You may inquire.

Mr. MEDINA. No questions.

Mr. MEDINA. Now it may be that you will later offer some documents here concerning which the presence of the witness may be necessary. I do not know as to that because I have not seen these papers. Perhaps if the witness is allowed to go back to Florida we may get into some kind of a jam. So far as I know, I have no questions to ask at all, but I may say further that if these papers which they wish to offer later merely show that this man came to the hotel there, I am going to have no objection to that, but
114 if they go into a lot of things that the documents show as to bellboys and other people going up and hearing this and hearing that, I may have some objections, but I hope not.

Mr. CORREA. There is no secret what we are going to show, Judge. We are going to tie the documents up by handwriting and other testimony to prove who this William Thomas was and who his companion was, and who the man was that called for them. That has already been identified I take it as Edward John Kerling.

Mr. MEDINA. If that is all it is, we are going to make no objection at all.

Mr. GOODKIND. And I take it there is no objection to this witness returning to Florida.

Mr. MEDINA. None I can see, and I have the assurance of the Government that there is no little entry somewhere around with these cards that does more than establish what has been indicated.

Mr. GOODKIND. That is correct.

Mr. MEDINA. Very good. That is all right.

Mr. GOODKIND. Counsel indicate they would like Mr. Speer to remain until this afternoon, but thereafter they will not require his presence.

The COURT. Then we will adjourn, gentlemen, until two o'clock.

(Recess until 2:00 p. m.)

115 AFTERNOON SESSION

GARNETT ANDREWS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Mr. Andrews, where do you live?—A. I live in Jacksonville, Florida.

Q. And what is your occupation?—A. I am manager of the Seminole Hotel in that city.

(Paper marked "Government's Exhibit 51" for identification.)

Q. Mr. Andrews, I show you Government's Exhibit 51 for identification and ask you whether that is a record produced by you pursuant to a subpoena?—A. Yes; it is.

Q. Is this a record of your hotel, the Seminole?—A. Yes, sir.

Q. And is this a record kept in the regular course of business in the hotel?—A. Yes.

Q. What kind of a record of business is it?—A. That is the transient ledger card on which the financial account of the guest is kept.

Q. Does that indicate on it each day the room is occupied?—A. Yes; it does.

Mr. GOODKIND. You may inquire.

Mr. MEDINA. No questions.

116 THOMAS WILLIAMS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Mr. Williams, where do you live?—A. Jacksonville, Florida.

Q. What is your occupation?—A. Bellman.

Q. Where?—A. Seminole Hotel.

Q. Were you at a bellboy at the Seminole Hotel in June of this year?—A. Yes, sir.

Q. I show you two photographs marked "Government's Exhibits 4 and 5 for identification, and ask you whether you have seen the men of whom these are photographs?—A. Yes, sir.

Q. You have?—A. Yes, sir; both of them.

Q. You saw both of them?—A. Yes, sir.

Mr. GOODKIND. May the record indicate that the witness has identified pictures previously identified as those of Edward John Kerling and Herman Otto Neubauer.

Q. Where and when did you see those men?—A. Hotel Seminole, June 17th of this year.

Q. At what time, approximately?—A. Oh, about 12:20 or thirty, something like that: after noon.

Q. And what was the occasion?—A. Well, he came in and registered and I took the bags up to the room; I roomed him.

117 Q. Do you recall what the number of the room was?—A. 402.

Q. Did you do anything else?—A. Yes; I took him some ice.

Q. Were those two men in that room when you brought the ice?—A. Yes, sir.

Mr. GOODKIND. You may inquire.

Mr. MEDINA. No questions.

CLIFFORD WEBB, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Mr. Webb, where do you live?—A. I live in Jacksonville, Florida.

Q. Were you formerly employed by the Seminole Hotel?—A. I am.

Q. As what?—A. As bellman.

Q. Were you employed as bellboy in June of this year?—A. I was.

Q. I show you two pictures marked "Government's Exhibits 4 and 5" for identification, and ask you whether you have seen the individuals of whom those are photographs?—A. I have seen these two.

118 Mr. GOODKIND. The record may indicate that the witness has identified pictures previously identified as those of Herman Otto Neubauer and Edward John Kerling.

Q. Where and when did you see them, Mr. Webb?—A. I saw them on June 18, 1942.

Q. And where?—A. At the Seminole Hotel, Room 402.

Q. Did you go up to the room?—A. I did.

Q. What did you do?—A. I carried some ice and whiskey.

Q. And where were the two men?—A. They were in the room.

Mr. GOODKIND. At this point I should like to offer Government's Exhibit 51 for identification in evidence.

Mr. MEDINA. No objection.

(Government's Exhibit 51 for identification received in evidence.)

Mr. GOODKIND. With the Court's permission I will point out some entries on this exhibit to the jury. This is Government's Exhibit 51, a record of the Seminole Hotel which indicates that

a Mr. Kelley occupied Room 402 on June 17th and June 18th of this year.

You may inquire.

Mr. MEDINA. No questions.

119 WILLIAM GORDON LEE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Mr. Lee, where do you live now?—A. Buffalo, New York.

Q. Did you formerly live in Jacksonville, Florida?—A. I did.

Q. Did you live there in June of this year?—A. I did.

Q. And what was your occupation at that time?—A. I was manager of the hat department at Levy's.

Q. Is that a department store in Jacksonville?—A. It is a ready-to-wear store.

Q. I show you a picture marked "Government's Exhibit 5" for identification and ask you if you have ever seen the man of whom that is a picture?—A. Yes; I have.

Q. When and where did you see him?—A. I saw him, I believe it was, June 18th, and sold him a hat.

Q. This way where, in Levy's department store?—A. In Levy's; yes, sir.

Q. And was there anyone with him?—A. There was a man about three or four inches taller than he, very dark hair. I could not positively identify him from the pictures.

Q. But you recall this man?—A. I recall that man quite definitely.

120 Mr. GOODKIND. You may inquire.

Mr. MEDINA. No questions.

FRANK CALLAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

(Papers marked "Government's Exhibits 52 and 53", for identification.)

Q. Mr. Callan, you live in New York City?—A. No, sir; I live in Mount Vernon, sir.

Q. And what is your occupation?—A. Room clerk, Hotel Commodore.

Q. I show you two slips of paper marked Government's Exhibits 52 and 53 for identification, and ask you whether, first, you have furnished these pursuant to subpoena?—A. No.

Q. Are these records of your hotel?—A. That is right; yes, sir.

Q. And they have been furnished by the hotel pursuant to subpoena?—A. That is right.

Q. Are these records kept by the hotel in the regular course of business?—A. Yes; they are.

Q. What kind of records are they?—A. Rooming records.

Q. And by whom are such records made out?—A. This is made out by the clerk on duty.

120 A Q. When a guest enters the hotel?—A. That is right.

Q. And they indicate the name of the guest?—A. The name of the guest is written by the guest himself, and the amount and room number is put in by the clerk and the clerk's initials put here [indicating].

Mr. GOODKIND. You may inquire.

Mr. MEDINA. No questions.

121 Mr. CORREA. If your Honor please, I understand it is stipulated by defense counsel that Edward John Kerling, the same whose photograph is Government's Exhibit 5 for identification, as identified by the witness Burger, and Werner Thiel, whose photograph has been identified as Government's Exhibit 6 for identification, are not and will not be available to the Government as witnesses.

CHARLES RONALD MACINNES, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BURKE:

Q. What is your occupation, Mr. MacInnes?—A. I am a special agent of the Federal Bureau of Investigation.

Q. Attached to what office?—A. The New York field office.

Q. On June 23 of this year, Mr. MacInnes, at about 8 o'clock in the evening, where were you?—A. I was in the vicinity of Lexington and 46th Street in New York City.

Q. Did you have anyone with you?—A. Yes; Special Agent John Willis.

Q. Were you following anyone at that time?—A. Yes; we were.

Q. Will you look at Government's Exhibit 5 for identifi-
122 cation [handing to witness]. Is that a photograph of the man you were following?—Yes; it is.

Mr. BURKE. Indicating a photograph which has previously been identified by Burger as a photograph of Edward John Kerling.

Q. Will you tell us what you observed at that time?—A. I observed Edward Kerling getting out of a taxicab on the corner of 46th Street and Lexington Avenue, and shortly thereafter, about 20 minutes after 8, he entered the Twin Oaks Inn which is on the corner of 47th Street and Lexington Avenue. About ten minutes later I saw him seated at a table with two other men in the Twin Oaks Inn. One of these men I subsequently ascertained was Anthony Cramer.

Q. That is the defendant on trial?—A. Yes.

Q. What did you do then?—A. I remained in the Twin Oaks Inn, until I notified the office about 25 minutes after 9, and I left,

the Twin Oaks Inn and at that time the three men were still sitting at the table.

Q. About how long had you remained at the Twin Oaks Inn in observing them?—A. About 55 minutes.

Q. What did you see them doing during the time you watched them?—A. When I saw them they were sitting talking, and they were taking occasional drinks; apparently not eating but just had drinks in front of them.

Q. Did there come a time when one of them left?—
123 A. Yes, about 9:45 Edward Kerling left the Twin Oaks Inn.

Q. Then what did you do?—A. I followed Kerling who went up Lexington Avenue to 49th Street.

Q. And what did he do up there?—A. He walked back and forth in front of the Brooks restaurant, occasionally looking inside as though looking for someone who had not shown up.

Q. As I understand it you had left the defendant Cramer and the other man in the Twin Oaks restaurant?—A. Yes; that is right.

Q. Finally what did you do with respect to Kerling?—A. Kerling was taken into custody about 10 o'clock on the night of June 23rd, in the vicinity of 49th Street and Lexington Avenue.

Q. Coming down, Mr. MacInnes, to June 27, 1942, were you in the vicinity of 171 East 83rd Street?—A. Yes; I was.

Q. At what time of the day?—A. 8 o'clock on until about 10:15 a. m., in the morning.

Q. Was anyone with you in the morning?—A. Special Agent Willis was with me.

Q. Will you state what you observed there?—A. I observed Anthony Cramer leave his residence at 171 East 83rd Street and walk to the Lexington Avenue 86th Street station and board
124 a train. He got off at the Grand Central stop, walked up the stairs, glancing in Thompson's cafeteria, went out to 42nd Street and then entered the Commodore Hotel.

Q. Did you see him come out of the hotel?—A. No; I did not.

Q. Coming down to the afternoon of that day, Mr. MacInnes, were you back up on 83rd Street in the afternoon?—A. Yes; I was.

Q. Anyone with you?—A. Special Agent Willis was with me.

Q. About what time was it?—A. That was about 2:30 p. m. in the afternoon.

Q. You were outside this same address, 171 East 83rd Street?—A. Yes; that is correct.

Q. Tell us what you observed?—A. About 3:45 p. m. I observed Anthony Cramer leave 171 East 83rd Street with a woman.

(Government's Exhibit 54 marked for identification.)

Q. Will you look at Exhibit 54 for identification [handing to witness], a photograph, Mr. MacInnes. Is that the woman that you saw Mr. Cramer leave the apartment with at that time?—A. Yes; that is.

Q. Did you follow them?—A. Yes; I did.

Q. Where did they go?—A. They took the subway at 86th Street, went down to Grand Central stop and entered Thompson's cafeteria on 42nd Street near aPrk Avenue.

Q. At about what time did they arrive at Thompson's cafeteria?—A. A few minutes after 4.

Q. That is right near Grand Central?—A. Yes, that is right.

Q. Did they go into the cafeteria?—A. Yes, they entered the cafeteria and ordered a—obtained something to eat.

Q. How long did they remain there?—A. They remained there approximately half an hour.

Q. Eating all the time they were there?—A. They were eating and talking.

Q. There came a time when they left?—A. They left about 4:30.

Q. Did you follow them?—A. Yes, I did.

Q. Where did they go?—A. They took the subway back to 86th Street and got off and walked up to the corner of 88th and Lexington Avenue, and stood and talked on the corner for a few minutes.

Q. Then what happened?—A. They separated at that point and Anthony Cramer reentered 171 East 83rd Street.

Q. Now coming down to the evening of that day, which is still June 27th, were you once more in that vicinity?—A. Yes, I was.

Q. That is at 171 East 83rd Street?—A. That is right.

126 Q. At what time?—A. I was there from 5 o'clock on until about 8:55 p. m. that night.

Q. What occurred at 8:55 p. m. that night?—A. Anthony Cramer left 171 East 83rd and walked up to 165 East 88th Street, which is the Kolping House and he went into the Kolping House.

Q. That is the name of the place, the Kolping House?—A. Yes.

Q. You followed him?—A. Yes, I did.

Q. Were there other agents with you?—A. Yes, there were.

Q. And what did you do thereafter?—A. We waited outside the Kolping House until about 10:50 p. m. that night, and then Special Agents Willis, Duncan and I entered the Kolping House.

Q. What did you do in the Kolping House?—A. We asked for Anthony Kramer. He was sitting at one of the tables in the back room, and he came up to us. We told him we would like to see him at the office, would like to have him accompany us to the New York field office, which he did.

Mr. BURKE. At this time the Government will offer Exhibit 5 for identification, the photograph identified as a photograph of Kerling.

Mr. MEDINA. No objection.

(Government's Exhibit 5 for identification marked in evidence.)

127 Cross-examination by Mr. MEDINA:

Q. What was this Kolping House, do you know?—A. Well, that is, as I understand it, a German church society. It is a gathering place for members of the society, and a few of the people lived in the house.

Q. Isn't it a sort of a place in the nature of a Y. M. C. A. maintained by some Catholic society in this city?—A. That is my understanding.

Q. And it was in that Kolping House that you actually took Mr. Cramer into custody; as I understand it?—A. We asked him in the Kolping House if he would come down to the office with us.

Q. He made no remonstrance, I take it; but simply went along with you?—A. That is correct; he did.

Q. Now, going back to the first of these days you mentioned—that was June 23rd, wasn't it?—A. Yes.

Q. My recollection of the calendar is that that was a Tuesday and that June 27th was a Saturday. Is that in accordance with your recollection?—A. Yes.

Q. When you came into this place as you described it here today you were following Kerling, were you not?—A. Yes; I was.

Q. That was the job you had been assigned to on the 23rd?—A. To follow Kerling and ascertain his contacts.

Q. When you were following him, were you following
128 him alone or did you have some other agent with you?—A. I had another agent with me.

Q. You did not mention him, and I wondered who he was.—A. I believe I did; with agent Willis.

Q. I think you mentioned agent Willis on the 27th but I don't think that you mentioned agent Willis was with you on the 23rd, but in any event you now state that fact to be, that he was with you?—A. Yes; that is correct.

Q. And then when you saw Kerling go into this Twin Oaks Restaurant you followed him in, did you not?—A. Yes.

Q. Did Willis go in with you?—A. Agent Willis did not accompany me in. He stayed outside at that time.

Q. He stayed outside?—A. Yes.

Q. Did I understand you to say that there came a time during that evening when some message was transmitted back to the central office of the Bureau?—A. That is correct.

Q. That was not done as soon as you saw Kerling enter the Twin Oaks Restaurant, was it?—A. No; it was not.

Q. So that if we address ourselves to the time when you saw Kerling go in, Willis stayed outside, and you went inside; am I right about that?—A. That is correct.

Q. Now was there any time during that evening before you came out, that Willis came in?—A. Not while I was
129 there, no.

Q. He stayed outside all the time that you were inside?—A. Yes.

Q. Do you know where you saw him standing last after you entered the Twin Oaks Inn that evening, and I refer to Willis?—A. He was across the street.

Q. Across the street. Have you any notion from where he stood over across the street, he could observe what was going on inside the Twin Oaks Restaurant?—A. Well, from the position where I last saw him standing he could not have observed the activities in the entire restaurant. He could have seen certain parts of it.

Q. So that he could have seen some of the things that went on inside the Twin Oaks Inn from his position across the street, you say?—A. Yes. He could not have seen the table at which they were sitting from the particular position he was in when I entered.

Q. So that as far as you know, you were the only representative of the Government to witness what you testified to as having occurred at the Twin Oaks Inn that evening?—A. No. Later, before I left that evening, other agents came to the Twin Oaks Inn.

Q. We will go back then, and I take it you understand the pur-
pose of my question; it is because of this two witness rule
130 that we all know about, so there is no secret of what I am getting at.—A. Certainly.

Q. When you first went in there was a time when you were the only representative of the Government who was watching these men inside, isn't that so?—A. Yes; that is correct.

Q. And that was about up to nine-thirty, was it?—A. No, it was not; it was not that late. Other agents came shortly after nine o'clock; and two of them at least entered the restaurant while I was in there.

Q. While you were still there?—A. Yes.

Q. Now they came pursuant to some message that was transmitted back to headquarters, didn't they?—A. Yes.

Q. So that at least we have this clear: that from the time you saw Kerling go in there and went in yourself up to somewhere in the neighborhood of nine o'clock, you were the only Government agent there to watch these men?—A. I was the only one inside.

Q. That is what I meant.—A. Yes.

Q. Now, during that time that you were all alone, my recollection of your testimony is that all you observed was that they sat there at the table and they conversed, they talked together, and that they had drinks brought and that they consumed those drinks?—A. Yes.

Q. You were not close enough from where you sat to hear what they were saying, I take it?—A. No; I was not.

131 Q. After these other men came in, how long did you remain there with these other men representing the Government?—A. I remained about twenty minutes.

Q. About twenty minutes?—A. Yes.

Q. And during that twenty minutes did Kerling remain there at the table?—A. Yes; he did.

Q. And these men simply sat there and nothing further occurred except what you have told us?—A. Yes.

Q. Coming down to June 27th, am I to understand that you and Willis were together all the time?—A. We were together most of the time, if not all of the time.

Q. Let us try to divide it up: in the morning you saw Mr. Cramer come out of this place where he resided, didn't you?—A. Yes.

Q. Now, you and Willis were downstairs in the street waiting for him to come out, weren't you?—A. We were outside of his building waiting for him to come out.

Q. That is what I mean. You did not go upstairs and wait outside the door of his room or outside of the apartment, but you were downstairs, both of you?—A. That is correct.

Q. And then he came out and you and Mr. Willis followed him as he went downtown in the subway?—A. Yes.

Q. When was the time that you and Mr. Willis separated? Was it when Mr. Cramer went in the Commodore?—A.

132 No, we were together during the morning, and in the afternoon we were together going down to Thompson's cafeteria, and while at Thompson's cafeteria. The time we parted was when Anthony Cramer and Norma Kopf left the Thompson's cafeteria and returned to 86th Street.

Q. And when they left Thompson's cafeteria Mr. Willis went off about some other business and you followed Miss Kopf and Mr. Cramer as they went back uptown in the subway?—A. Yes; that is right.

Q. So that at that period you were alone and no other Government agent was with you?—A. Yes.

Q. Now in the evening I take it from what you testified, there were several of the Government men working together there?—A. Yes.

Q. Or am I wrong about that?—A. Yes; there were.

Q. I don't know whether I put the question comprehensively enough, but I understand, and I want you to confirm it now, that during all that you did on those two days of the 23rd and 27th of June, 1942, you heard no conversation between Mr. Cramer and anyone else?—A. That is correct, I did not.

Mr. MEDINA. That is all.

Redirect examination by Mr. BURKE:

Q. As I understand you, sir, this photograph, Exhibit 54, of the woman who was with Cramer when you followed them down to Thompson's cafeteria on the afternoon of the 27th, is Norma Kopf?—A. Yes.

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Mr. BURKE. That is all, Mr. MacInnes.

W. WILLIS FISHER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. BURKE:

Q. What is your occupation, Mr. Fisher?—A. I am a special agent of the Federal Bureau of Investigation.

Q. Attached to what office?—A. New York office, since January 1939.

Q. On the evening of June 23, 1942, were you in the vicinity of the Twin Oaks Restaurant?—A. Yes, I was.

Q. Where is that located?—A. 44th Street and Lexington Avenue, east side.

Q. Will you tell us what you observed there and about what time it was?—A. I arrived in the vicinity of—shortly before nine thirty p. m., and with Special Agent B. D. Rice, entered the Twin Oaks Restaurant and Bar, and inside observed three individuals sitting at a table.

Q. Will you look at Government's Exhibits 5 and 6 for identification [handing]. Are those photographs of two of the persons seated at the table?—A. Yes. This is Edward Kerling [indicating].

134

Mr. BURKE. Indicating Exhibit 5.

The WITNESS. And this is Werner Thiel [indicating].

Mr. BURKE. Indicating Exhibit 6 for identification.

Q. Who was the third person at the table?—A. Anthony Cramer.

Mr. BURKE. I will offer Government's Exhibit 6 for identification in evidence.

Mr. MEDINA. No objection.

(Government's Exhibit 6 for identification received in evidence.)

Mr. BURKE. This is a picture of Werner Thiel.

Q. Will you tell us what you observed thereafter, Mr. Fisher?—

A. I remained in the bar approximately ten minutes, after which Special Agent Rice and I left the bar and shortly thereafter, approximately one or two minutes, Kerling left the bar and walked up Lexington Avenue, east side, to a point in front of the Shelton Hotel.

Q. During the time you and Mr. Rice were observing the three men at the table, that is, Cramer and Thiel and Kerling, what did you observe them do?—A. I remained in the bar about ten minutes, and during that time they were apparently drinking some whiskey or beer or something of that sort. They were drinking. I did not see them eating at any time.

135 Q. Did you see them when they were talking together?—A. Yes. They apparently were. Their lips were moving although I did not hear the voices.

Q. You said you left the restaurant and went up the avenue after Kerling?—A. That is correct.

Q. Go on with what you were about to say.—A. Special Agent Rice and I followed Kerling up Lexington Avenue, and he left the bar approximately quarter to ten, and for approximately ten or fifteen minutes he remained in the vicinity of the Shelton, walking down to the corner by the Brooks Restaurant, and we waited until approximately ten o'clock when he was taken in charge by Special Agent T. J. Donegan and I in the presence of Special Agents Rice and MacInnes.

Q. Will you look at Exhibit 35 previously identified by the witness as a money belt? Did you see that money belt at that time, Mr. Fisher?

Mr. MORSE. May I ask what time?

Mr. BURKE. At the time you have just told us of when you arrested Kerling.

A. Immediately after the arrest of Kerling he was brought to the New York office at Foley Square here and a preliminary search was conducted and at that time I removed this particular belt from Kerling's waist.

136 Q. Now, was there anything in the belt when you removed it from Kerling's waist?—A. Yes; it contained sixty-one fifty bills.

Q. Subsequently that evening did you return to the Twin Oaks restaurant?—A. Yes, sir; I did.

Q. About what time?—A. I arrived there shortly before eleven p. m.

Q. What did you observe at that time?—A. At that time, just approximately eleven p. m., I observed Cramer and Thiel leave the restaurant and proceed on 41th Street to Third Avenue, and subsequently to the Thompson cafeteria on 42nd Street.

Q. Did they go into the Thompson cafeteria?—A. Yes, sir; they went in and had coffee and some other food.

Q. Did you continue watching them?—A. I did; sat very close to them.

Q. For how long?—A. I would say they were in there fifteen minutes, approximately.

Q. And then what happened?—A. They left the restaurant and walked out 42nd Street toward Madison Avenue and walked back again and finally separated in front of the entrance to the I. R. T. subway.

Q. During this time that they were walking together along 42nd Street, could you see whether they appeared to be conversing?—A. They appeared to be; yes, sir.

Mr. BURKE. You may inquire.

137 Cross-examination by Mr. MEDINA:

Q. When was it that you say they appeared to be conversing together?—A. I would say all the while, sir.

Q. Well I meant the last answer that you gave; I did not recall specifically what period that referred to. I thought it referred to when you were walking along the street.—A. That is right; I was closer than I am to you to them.

Q. And you were behind them, of course?—A. No; I was off to the side. Almost parallel to them at times.

Q. Almost walking along-side of them?—A. That is correct.

Q. And that was when, although you did not hear any sound uttered, you saw their lips moving?—A. I did not hear the sound in the restaurant, I said; in the bar and grill.

Q. Then, perhaps, I will go back over it in more detail. First let me ask you the general question: was there any time during the entire day and evening of June 23rd that you heard anything said by Mr. Cramer or anyone with whom Mr. Cramer was conversing?—A. Not one word.

Q. So that, when you say they appeared to be conversing, that was not because you heard anything that either of them said?—A. That is correct.

138 Q. And, without attempting to be at all technical about it, when you say they appeared to be conversing it was because, as far as you could tell, watching them it seemed as though they were talking to each other?—A. It appeared obvious to me; yes.

Q. That is all you meant by that, and that is all I mean; I am not quibbling about it at all. Now, let's go back to the time that you first got on the job. I have a note here that there were all together at one time or another Special Agents MacInnes, Donegan, Rice and yourself—Fisher.—A. That is correct.

Q. Do those four constitute all of the FBI men who were at one time or another following Cramer or the other men on the evening of the 23rd of June?—A. They would not be. There were definitely others there. I would not be able to tell you who they were.

Q. I would like to get a list of them all so we can bring it down and have it disposed of once for all. How many agents were there altogether at one time or another working on this case around the Twin Oaks restaurant or any other place that Cramer was on the evening of the 23rd of June?—A. That would be impossible to say that. I can say the ones I saw. There were others there that I did not see apparently.

Q. I really think you are attributing to me a little more
139 technical view than I am taking. I only had in mind of course the people that you knew were there.—A. All right. Special Agent in charge T. J. Donegan, Special Agent P. D. Rice, C. R. MacInnes, Willis—John Willis; Special Agent Foster I believe was in the vicinity at one time. That is about all I recall.

Q. So that including yourself we have six who were there or around there at one time or another, to your knowledge, that evening?—A. Well, I know that those six had certain assignments. There may have been others; I don't recall.

Q. I want to know were those all of the men that you saw on this assignment on the evening of June 23rd. And please be assured I am not trying any quibbling about this. I am merely trying to find out who they were.—A. I am doing the best I can to recall, sir. I say there may have been others but I cannot recall at the moment.

Q. You say the six were Agents Fisher, Foster, Donegan, Rice, MacInnes and Willis?—A. Yes; and I know there were others there on certain assignments, but I do not recall who they were. I am being frank about it.

Q. Well can you say this—that there was a certain time when you started working on this matter in connection with Cramer or anyone Cramer was with that evening—there was a certain time we can begin with that you appeared on the scene?—A. Yes, sir. I would say shortly before 9:30.

140 Q. So when we say shortly before 9:30——A. It may have been 9:20 or 9:25. It might have been.

Q. I do not care whether it was even 9:15. But 9:15, 9:20, 9:30 or thereabouts—before then we can be sure you did not know what went on up around the Twin Oaks Inn?—A. Exactly.

Q. Because that is when you first turned up there?—A. That is correct.

Q. So that whether there was one or more of these other men there before that you naturally do not know?—A. Yes sir.

Q. At that time, whether it is 9:15, 9:20, 9:25, or 9:30, when you came in you went into the bar and you were there about 10 minutes?—A. I believe so.

Q. Who else representing the Government was in there while you were there for those 10 minutes?—A. Special Agent P. C. Rice.

Q. So Rice and you were there together then?—A. That is correct.

Q. As Mr. MacInnes, who has just left the stand, was there for a time, you must have come in just shortly after he went out?—A. It is possible.

Q. As far as your recollection goes that is when you did arrive?—A. I don't recall seeing him in the bar.

141 Q. You did not see him inside the Twin Oaks Inn at all that evening, did you?—A. No; I did not.

Q. So that you were in there with Rice. Now you then together with Rice and others went after Kerling and took him into custody that evening, didn't you?—A. That is correct.

Q. So that after you left the Twin Oaks Inn after being there about 10 minutes what you were after was Mr. Kerling?—A. No. Well, that was our assignment; yes.

Q. That is what I meant. So that when you left there you were not interested any more with Cramer or whoever was left in the Twin Oaks, but you went with Rice or whoever else was representing the Government there, after Kerling?—A. I was interested of course, but I had one assignment and that was to follow Kerling.

Q. Anyway after that 10 minutes you did not see Cramer any more that evening, am I right about that?—A. Oh, yes; I did. Yes, sir; I saw him later that evening.

Q. You saw him of course when you came back, as you testified on direct examination, but I am trying to get this time that you were there isolated so the jury can get a perfectly clear notion of what you saw when you were in there. Do you understand that?—A. Yes, sir.

Q. When you were in there that ten minutes Mr. Willis
142 was there and you were there—or was it someone else representing the Government was there with you?—A. He may have been in there and I did not see him. He may easily have been in the restaurant. I don't recall seeing him.

Q. You do not recall seeing Mr. Willis?—A. No, sir; but the bar was fairly big, there was a restaurant part; it was impossible to see everyone.

Q. Was Mr. Rice in there with you? I think you said Mr. Rice.—A. Yes; he was there with me.

Q. While you were there together you were the only Government men there in the restaurant?—A. I cannot say that. The only ones that I knew about.

Q. You know these fellows in the FBI pretty well, don't you?—A. I mean they may have been there and I did not see them. My attention was directed toward the subjects, toward Kerling, Cramer and Thiel, and I did not see everyone came in and out of that restaurant. I was interested in those three.

Q. I see. And while you saw them there there was merely the sitting together and apparently conversing and drinking, and that is all you observed?—A. Yes, sir.

Q. When you came back after Kerling was taken into custody you got back to the Twin Oaks shortly before 11, as I remember it?—A. Yes, sir.

Q. Did you have any other agent with you?—A. I came back with special agent in charge T. J. Donegan.

Q. You and Donegan came back together to the Twin Oaks Inn shortly before 11?—A. That is right.

Q. Did Donegan stay with you until you stopped following Cramer that evening?—A. Well, not exactly in my presence, but he was in the vicinity.

Q. That is, you and he were following Cramer together but not actually alongside of each other?—A. That is right; he was present and got most of the surveillance I am sure.

Q. That is what I mean. That was the intent, and as far as you know that is just what you and Donegan were doing together that evening?—A. He had issued instructions that certain agents were to take Thiel and certain agents would take Cramer.

Q. And you and Donegan were the two who were assigned to take Cramer in the latter part of the evening?—A. Yes, along with Special Agents Foster and Rice.

Q. Were there four of you that were following Cramer when he left the Twin Oaks Inn shortly before 11 o'clock?—A. Oh, yes. Special Agent Rice remained at the scene while I went to the office, and when I got back he was still there, and Special Agent Foster came with me, and did Special Agent T. J. Donegan.

Q. I will confess you get me a little bit mixed up here now, but I will try to straighten it out. I think we have got the first part of the evening straightened out—that you were there for 10 minutes in at the bar, and during that 10 minutes Rice was also in there with you.—A. Yes, sir.

Q. No doubt about that?—A. No doubt.

Q. As to the latter part of the evening as I understand your

fast answer it is that when you went after Kerling, Rice remained at the Twin Oaks watching whoever was there?—A. No, I don't mean that; sir. I mean that he was with me at the time Kerling was taken into custody, but after that he did not accompany me me to the office, and he returned back to the Twin Oaks after we removed Kerling to the office.

Q. So that when you say Rice was at the Twin Oaks you did not mean that you saw him there, but you knew he had been instructed to go back and you assumed he did go back?—A. Well, I knew that he did because I saw him there on my return.

Q. That is all right. I say he was there but you did not see him there all the time, because you were not there all the time yourself.—A. That is right.

Q. As to Donegan, Foster and yourself you, following instructions, coming back shortly before 11 o'clock, picked Cramer
145 up and stayed with him the rest of the evening?—A. That is correct.

Q. Did you notice anything other than what you have described to the jury with reference to Mr. Cramer during that evening?—A. What do you mean?

Q. I really mean you have told the whole story as far as you remember it, as respects Mr. Cramer?—A. I believe so.

Q. As far as you can recall there is not anything that you have not told the jury already, that you observed Mr. Cramer doing that evening?—A. No; that is correct.

Q. And as to any conversation, it is perfectly clear that you heard no conversation in which Mr. Cramer participated?—A. Yes. I could not get close enough to hear it; that is right.

Q. Whether you got close enough or not the fact is you did not hear any conversation?—A. I think that answers it. I did not get close enough; I did not hear it.

B. D. Rice, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. Burke:

Q. Your occupation, Mr. Rice?—A. I am a special agent of the Federal Bureau of Investigation.

146 Q. Assigned to what office?—A. I am assigned to the New York office.

Q. On the evening of June 23rd of this year were you in the vicinity of the Twin Oaks Restaurant, Lexington Avenue and 44th Street?—A. Yes; I was.

Q. At about what time?—A. At about 9:30 in the evening.

Q. Was there anyone with you?—A. Yes; there were other agents with me.

Q. Was the gentleman who has just testified with you?—A. Yes: he was.

Q. Did you go in the restaurant?—A. I did.

Q. Will you look at Exhibits 5 and 6, photographs [handing to witness]. Did you observe those men in the restaurant?—A. Yes; I did.

Q. Was there anyone with them?—A. Yes: another man was with them.

Q. Can you identify the man who was with them?—A. Yes: he was Anthony Cramer.

Mr. BURKE. Exhibits 5 and 6, those are pictures of Thiel and Kerling.

Q. Did you remain in the restaurant observing them?—A. I remained in the restaurant for perhaps 10 or 12 minutes observing them.

Q. With Mr. Fisher?—A. With agent Fisher.

Q. After that did you leave the restaurant?—A. Yes; I did.

147 Q. Where did you go?—A. Together with Fisher and other agents we followed Kerling north on Lexington Avenue to a point near the Shelton Hotel, where he was taken into custody.

Q. During the time that you were in the restaurant watching Kerling and Thiel and Cramer what did you observe them doing?—A. They were sitting at a table and talking very earnestly.

Mr. MEDINA. I move to strike out the expression "very earnestly" as a characterization.

The COURT. Don't you think most of us can tell when people are talking earnestly or not?

Mr. MEDINA. I claim it is a characterization, your Honor, and not admissible.

The COURT. I think the witness may characterize the conversation, as to whether it was earhest, desultory or anything of that sort.

Mr. MEDINA. I respectfully except.

The COURT. I think I can tell when you are quite earnest.

Mr. MEDINA. I am earnest all the time, your Honor.

By Mr. BURKE:

Q. At a later time on this same evening June 23, did you return to the Twin Oaks restaurant, sir?—A. Yes: I did.

148 Q. Did you once more enter the restaurant?—A. I did.

Q. Anyone with you?—A. At that time I was alone.

Q. Did you join anyone in the restaurant?—A. There were agents outside. I didn't join any other agent in there. There were other people inside, of course.

Q. What time was it when you went into the restaurant the second time?—A. The second time it was probably 10:45 p. m.

Q. Did you see the same three men, that is Cramer, Thiel, and Kerling, that you had seen the first time?—A. No, sir. Kerling we had taken into custody, and when I returned to the restaurant Cramer and Thiel were still there talking.

Q. At a table?—A. Yes, sir; at a table.

Q. How long did you remain there?—A. At that time I stayed perhaps three or four minutes.

Q. Then what did you do?—A. Then I took a position outside of the restaurant where I could observe the entrance.

Q. Did Thiel and Cramer come out eventually?—A. They did.

Q. About what time?—A. At about 11 o'clock.

Q. Did you follow them?—A. Yes; I did.

Q. Where did they go?—A. They went down Lexing-
149 ton Avenue to 43rd, thence over to 3rd Avenue and down to 42nd, then they walked west to 42nd and Madison Avenue, and walked back to Thompson's restaurant there in the Grand Central building on 42nd. They entered the restaurant and approached the counter there, bought some food and sat at a table.

Q. About how long did they remain in Thompson's restaurant?—A. They sat there probably 12 to 15 minutes.

Q. During this period that you were following them in the street and also watching them in Thompson's restaurant were you near enough to observe whether they were conversing together?—A. Yes; I was. Occasionally they would stop as they walked along and stand and talk, and then move on for a few more feet and talk again.

Q. How long did they remain in Thompson's?—A. I said they stayed there probably 12 to 15 minutes.

Q. And then they left?—A. And then they left; yes, sir.

Q. Did you follow them?—A. Yes; I did.

Q. To where?—A. They walked back to the corner of Vanderbilt Avenue and thence east to a position in front of the Grand Central entrance there, where they shook hands and separated, Cramer going into the station, Thiel continuing down in the direction of the Commodore Hotel.

Q. Did you follow either of them?—A. I followed Thiel.

Mr. BURKE. You may inquire.

150 Cross-examination by Mr. MEDINA:

Q. One thing I would like to have clear, I am not trying to get you mixed up, nor have I tried that with anybody else, so please don't start with any such impression.—A. All right.

Q. Of your men was there someone in charge on the evening of the 23rd of June?—A. Yes; there was.

Q. Who was he?—A. Special Agent in charge T. J. Donegan.

Q. And working under Donegan were how many men that evening?—A. I cannot answer that question, sir.

Q. You do not know exactly how, many?—A. No, sir.

Q. I take it that all those who have already testified here were working under the supervision of Mr. Donegan that evening, so far as you know?—A. Well, I have been present during the testimony of several agents, and those I am quite certain were working under his supervision. I do not know all the witnesses.

151 Q. Well, it has only been this afternoon that the agents of the Department have testified, and I think you have been here all afternoon, haven't you?—A. Yes, sir.

Q. Do you know whether there came a time in the early part of June 23rd when Mr. Donegan made certain assignments to you agents as to what your duties were to be in this particular matter for that day?—A. I can answer for myself, sir. For the others, I cannot.

Q. I take it that your answer as to yourself is in the affirmative, that there was a time when you did get instructions that day from Mr. Donegan?—A. Yes, sir.

Q. What were you supposed to do?—A. Well, could you be more specific as to time.

Q. I mean what did Mr. Donegan tell you to do whenever he gave you the instructions, the first time he gave them on June 23rd?—A. (No answer.)

Q. Maybe I can go at it a different way, and I am honestly only trying to get these facts out, so please don't misunderstand.—A. If you could direct your question to the specific time of day I could probably answer it.

Q. I am going to try it from a different angle and maybe we will get it straightened out: is it a fact that until the man or men who were following Kerling that evening followed him into the Twin Oaks Inn and saw Thiel and Cramer there, that none

152 of the men in your department knew that Thiel or Cramer had any relation whatever to this matter?—A. I can only answer for myself, sir, and not for all the men in my organization, and so I am consequently unable to answer that question.

Q. You cannot throw any light on that? So far as these jurors are concerned, if they want to know when did the department first know they were in there, you just cannot help them.

Mr. Correa. I object to the form of the question as distinctly improper.

The Court. Do you understand it?

The Witness. Well, I would like to have it read again.

The Court. If you do not understand the questions have them repeated.

Q. (Question read.)—A. Well, except upon hearsay.

Q. I am willing to take the hearsay.

The Court. Tell the jury. Talk to the jury.—A. So far as I understand, Thiel and Cramer had entered the restaurant some time before my arrival. I do not know when, exactly when.

Q. Maybe you did not understand my question and I will put it a different way: I kind of got the impression here as I was listening to these other agents that the first time the depart-
153 ment or the Bureau of Investigation knew that Thiel and Cramer were in the Twin Oaks Restaurant was when the men following Kerling saw them in there. Now is that so or isn't it so?—A. That is my impression.

Q. So that we can take that as a starting point, can't we. That is when they first saw and first knew that Cramer and Thiel were in there.—A. Now, I do not like to be argumentative, sir, but as far as I am concerned you can take it for a starting point.

Q. All right. I am willing to do that, but you are not positive, but that is your opinion?—A. That is right.

Q. And I don't want to hold you to that or I don't want to hold the Government to it, but I want to get our bearings and have the jury be able to follow. Now we get back to the time that you participated, and as I get it, there were two occasions on the evening of June 23rd when you were in the Twin Oaks Inn and you saw Cramer in there with other people, is that right?—A. That is correct; yes, sir.

Q. And the first time you were in there how long?, I did not get that on your direct examination.—A. The first time I was in there was a period of probably ten or twelve minutes.

Q. And while you were in there on that occasion can you fix the time? You see it may be important here.—A. I under-
154 stand your point, sir. The best I can say is that it was probably from ten or twelve minutes following nine-thirty.

Q. Yes. That makes it about 9:45 or thereabouts; maybe a little before 9:45.—A. Well, I recall that I was outside for probably five or six minutes before Kerling left the restaurant, at which time I was unable to observe what occurred in the restaurant. That is, the men might have moved about without my knowledge, in there at that time.

Q. Yes; that is perfectly clear. So that somewhere in the neighborhood of 9:45 is when you went in on the evening of the 23rd?—A. No, sir; somewhere in the neighborhood of 9:30 I went in and at 9:45 Kerling came out.

Q. So that the time you were in there was approximately from 9:30 to a little before 9:45?—A. Until probably—five or six minutes before 9:45.

Q. Well, that would put you in there just about ten minutes, wouldn't it?—A. That is right.

Q. And when you were in there that ten minutes Kerling was still there and Thiel was there and Cramer was there?—A. That is right.

Q. Now the next time is when you came back and that was after Kerling had been taken into custody, wasn't it?—A. Yes, sir.

Q. And you fixed the time in your direct examination
155 at about 10:45, and you say that you were then in the Twin Oaks about three or four minutes?—A. That is right.

Q. And then you saw Thiel and also you saw Cramer at the table?—A. Yes, sir.

Q. Now is it perfectly clear that at no time that evening did you hear anything that was said either by or to Cramer?—A. No, sir; I did not hear anything.

Q. Whether you were close enough or whether you were not, the fact is you heard no conversation between Cramer or anybody else that evening?—A. That is right.

Mr. MEDINA. That is all.

Mr. BURKE. That is all.

CHARLES H. STANLEY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. BURKE:

Q. What is your occupation, Mr. Stanley?—A. I am a special agent for the Federal Bureau of Investigation.

Q. Attached to what office?—A. The New York office.

Q. Now on the night of June 23rd of this year were you with these other agents who have testified who made various observations of the Twin Oaks Restaurant and Thompson Restaurant?—A. I was in the same vicinity with them; yes, sir.

Q. And coming down to Thompson's restaurant, did you
156 make any observations in Thompson's restaurant that night?—A. I observed Cramer and Thiel enter Thompson's restaurant where they apparently purchased something and sat down at a table where they remained for approximately ten or fifteen minutes. They appeared to be talking, and after that they left and walked to 42nd Street, and thereafter they walked from Thompson's restaurant to the corner of 42nd Street and Vanderbilt, where they stopped and talked for a moment or two, and then they walked up and down 42nd Street from Thompson's to Vanderbilt Avenue for two or three times. They appeared to be talking, and thereafter they stopped at approximately the entrance to the Grand Central Station there where they shook hands and departed. Thiel continued down 42nd Street and Cramer entered

the Grand Central Station entrance and walked for a short distance in the station, and thereafter he immediately turned around and walked back facing me. I was behind him. And then he came back out on 42nd Street, walked down 42nd Street, and entered the Lexington Avenue subway, caught the uptown Lexington Avenue subway to 86th Street.

Q. You followed him?—A. Yes, sir; I did.

Q. Where did he go at 86th Street?—A. He left the subway and walked on Lexington Avenue to 83rd Street, and then down 83rd Street to 171 East 83rd Street, where he entered.

157 Mr. BURKE. You may inquire.

Cross-examination by Mr. MEDINA:

Q. Just when did you start following Mr. Cramer on that evening of the 23rd?—A. I began following Mr. Cramer as he left the Twin Oaks restaurant at 44th Street.

Q. That is where you checked in, as it were, and then kept on until he got home that evening, or until he got into the subway?—A. Until he got home.

Q. And you followed until he got home?—A. Yes, sir; I observed him enter the door.

Q. And that was the assignment Mr. Donegan gave you to do that evening?—A. Well, I had been there before Thiel and Cramer left, just before they left I was assigned by Mr. Donegan to follow Cramer wherever he went and observe his contacts and actions.

Q. And that is exactly what you have described to the jury here?—A. That is right.

Q. On the evening of the 23rd of June?—A. That is right, sir.

Q. Now did you know that Mr. Fisher was also following him that evening?—A. I observed Mr. Fisher; yes.

Q. But you were not working together?—A. No, sir; we were in the same vicinity; but I was not working right with him.

158 Q. That is all. Oh, I might ask one other question: you did not hear any conversation between Mr. Cramer or Mr. Thiel or anyone else that evening, did you?—A. I did not actually hear any conversation.

Mr. MEDINA. That is all.

Mr. BURKE. That is all.

HARVEY G. FOSTER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. BURKE:

Q. What is your occupation, Mr. Foster?—A. I am a special agent of the Federal Bureau of Investigation.

Q. Attached to what office?—A. The New York office.

Q. On the night of June 23rd of this year, Mr. Foster, were you

present when Thiel and Cramer left Thompson's cafeteria?—A. Yes, sir.

Q. And did you thereafter follow Thiel?—A. Yes.

Q. And Exhibit 6, a photograph, is that a representation of the man you followed [handing]?—A. That is Werner Thiel, the man I followed; yes, sir.

Q. Will you tell us what you observed and did?—A. Well, about eleven o'clock on the night of June 23, 1942, I was in front of the Twin Oaks Inn at 11th Street and Lexington Avenue, and I observed Werner Thiel leave that restaurant in the company of Mr. Cramer.

159 Q. What time was this?—A. About eleven o'clock.

Q. Did you observe them go to Thompson's cafeteria?—A. Yes, sir.

Q. Coming down to after they left Thompson's cafeteria, then tell us what you did?—A. They left Thompson's cafeteria and walked up to Vanderbilt Avenue and Lexington Avenue, and then walked up and down on Lexington Avenue between Madison—I am sorry, that is 42nd street. They walked up and down on 42nd Street between Lexington and Madison Avenues for a period of a few moments—few minutes, I should say—and then after walking back and forth they parted at the entrance to the Grand Central and at that time I followed Werner Thiel down 42nd Street almost to the entrance of the Commodore Hotel, where he was taken into custody by Special Agents in Charge C. J. Donegan and S. J. Drayton and myself.

Q. About what time was that that Thiel was arrested?—A. That was approximately 11:45 or 11:50 p. m.

Q. That was the night of June 23rd?—A. June 22, 1942.

Q. Were you present when Thiel was searched thereafter?—A. Yes, sir.

Q. Can you tell us whether he had any money belt on him?—A. He did not have any money belt on him.

Mr. BURKE. You may inquire.

Mr. MEDNY. No questions.

160 R. C. CARDEN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. BURKE:

Q. What is your occupation, sir?—A. I am a special agent of the Federal Bureau of Investigation.

Q. In the month of June, Mr. Carden, did you go to 171 East 83rd Street and to an apartment in that house?—A. I did.

Q. On what day?—A. That was on Sunday, June 28, 1942.

Q. Was there anyone with you?—A. Yes; Special Agent Walter Crow.

Q. Which apartment house did you search?—A. Apartment C, fifth floor.

Q. Whose apartment was that?—A. That was where Anthony Cramer had a room.

Q. I show you Exhibit 34 for identification, which has been identified by the witness Burger as a money belt. Did you see that at that time, that is, June 28, in that room?—A. Yes; during the search of that room we found this money belt in a metal box. This box was under a radio table beside the bed; and the box also contained various shoe shining equipment.

(Papers marked "Government's Exhibits 55 and 56" for identification.)

161 Q. I show you Government's Exhibit 55 for identification, a piece of paper. Did you find that in that room?—A. Yes. This piece of paper, which is a sheet from the New York Times, was folded up and underneath the radio on the radio table beside the bed.

Q. I show you Government's Exhibit 56 for identification, a piece of paper. Did you find that in Mr. Cramer's room?—A. This piece of paper when I found it was torn into several pieces and was in a wastebasket in that room.

(Papers marked Government's Exhibits 57 to 62 inclusive for identification.)

Q. I show you Government's Exhibits 57 to 62 inclusive for identification, six postcards, and each one of them has clipped to it a large piece of paper which I will ask you to ignore, and just direct your attention to the postcards themselves. Did you find them in that room?—A. I found number 57 ——.

Q. Where?—A. That was in a dresser on the room; 58 was also in a dresser, dresser drawer; likewise 59, 60, 61 and 62.

(Papers marked Government's Exhibit 63 for identification.)

Q. I show you Exhibit 63 for identification, consisting of two typewritten sheets. Did you find those in that room?—A. Yes.

162 Q. Where about?—A. That was also in the dresser.

(Postcard marked "Government's Exhibit 64" for identification.)

Q. I show you Government's Exhibit 64 for identification, which is a postcard and again I have annexed to it with a clip a large sheet of paper which I will ask you to ignore. Did you find the postcard there?—A. Yes; this postcard was also in the dresser.

Q. Mr. Carden, did you find any money in the room?—A. Yes; in a book which was located in a book shelf in the room there was two $50 bills and three $20 bills.

Q. Do you recall the name of the book?—A. It was a book

pertaining to music. "Knowledge of Music" I believe was part of the title.

Q. And the book was on the shelf with other books?—A. Yes; it was on a metal shelf in a book rack containing about three shelves with other books.

Q. And those bills were in the book?—A. Yes.

Mr. BURKE. You may inquire.

Cross-examination by Mr. MEDINA:

Q. As a matter of fact you know, do you not, that Mr. Cramer had told some of the men in your department before you went up there that the money was in that book?—A. That is my knowledge; yes, sir.

Q. And he had also told the men in the department
163 that this belt was in the shoebox?—A. That is what I understood.

Q. Now speaking generally, you knew also that he had consented and signed some paper authorizing the men to go up to his apartment and to examine everything that was there?—A. Yes; it was on that authority that we conducted the search.

Q. Authority from him that he freely gave them to go ahead and do it. There is no doubt about that, is there?—A. No, sir.

Q. Now when you went up there what sort of a looking place was this at 171 East 83rd Street?—A. The particular apartment or room or what?

Q. Well, was it a humble sort of dwelling place or an expensive looking apartment house, or what sort of looking place was it?—A. Well, I would say it was a medium type of apartment, a type containing several rooms and apparently—of course I don't know—but apparently different rooms were rented out to individuals.

Q. It was a place where they took in roomers and rented the rooms to them, wasn't it?—A. It seemed to be.

Q. Seemed to be, and I believe that is what it was, and one of those rooms was rented by Mr. Cramer, wasn't it?—A. That is my understanding; yes, sir.

Q. Up there in that apartment 5-C. When you went
164 in that room what sort of a looking place was it?—A. In what respect, Mr. Medina, more specifically?

Q. Well, did it seem to be furnished in some luxurious way or did it look like a pretty simple, humble kind of a room with plain furniture and that sort of thing?—A. It was an ordinary type of room consisting of various pieces of furniture, a bed, a chair, a desk, dresser, table, and radio—it was not elaborate in any way.

Q. It was not elaborate in any way, and just the sort of a thing that a man working over in the boiler room in this licorice factory would be likely to have?—A. I don't know about that.

Q. Well, perhaps that is a characterization of mine, but as far as you knew when you went up there, you were not surprised to see the place just as you found it, were you?—A. Well, I had no particular idea what it would be like until I saw it.

Q. In any event, you described it pretty well in what you have already said to the jury about it.—A. I think so.

Q. Now as you went around there you naturally were looking for everything you could find? That was your purpose, wasn't it?—A. Well, everything of interest to the case.

165 Q. Isn't it a fact that you made a mighty thorough search of that place, over the whole room, before you left, or isn't it?—A. Yes, sir.

Q. And you took away with you absolutely everything that you thought might have the most remote or direct bearing upon Mr. Cramer's situation?—A. I took away those things that seemed most important.

Q. That seemed most important. Now there were a lot of other things in there besides the ones that have been identified, were there not?—A. Oh, yes; quite a few.

Mr. MEDINA. I wonder if perhaps somebody in the department has not got a little diagram. Mr. Willis, have you got some diagram there that I could use with this witness; a diagram of the room?

Mr. WILLIS. I will have one in a few minutes.

Mr. CORREA. I don't know, Judge, how that is particularly relevant or material. I have not interrupted counsel because we have proceeded pretty rapidly up to this point, but perhaps if counsel will indicate what his point is——

Mr. MEDINA. Yes, I will indicate. It was charged in the Government's opening that certain things were concealed. I take a contrary view, and I believe I am entitled to bring out from this witness exactly where he found each of the things he did

166 find, so that the jury can decide whether there was concealment or whether there was not.

Mr. CORREA. Let us be clear about that, counsel. It was charged in the Government's opening that the money belt was concealed, although it was not charged in the opening, though it now appears, that certain money was concealed as well, but those are the only things, so far as I know, and I do not see why any diagram or anything else is necessary to bring out all the facts concerning them. If it is, and we have one, we will gladly produce it, but I do not care to do anything which is going to add to the prolongation of irrelevant testimony.

MR. MEDINA. I can assure your Honor I do not want to bring in any irrelevant testimony.

The COURT. What is the point? There is no diagram in existence apparently.

Mr. CORREA. I am just informed there is. I thought Mr. Willis was going to make one. He says he has a rough sketch.

Mr. MEDINA. I saw the diagram when I went over all this with Mr. Willis, and I know what I want to bring out, but the point is there was no concealment. These things were open around the place.

Mr. CORREA. Our point is there was concealment as to money dealt and the money concealed in a book. We do not claim concealment as to the other things especially.

167 The COURT. What is it you are asking the Court for?

Mr. MEDINA. I want to bring out from this witness facts which I think bear very materially upon the intent. That is the issue in this case, and what he did with those things around his room is what I want to bring out. If they have not the diagram——

The COURT. Go ahead. I certainly am not stopping you.

Mr. MEDINA. I understood Mr. Correa was raising some question about it, but as he does not, I will go ahead without the diagram.

Mr. CORREA. We will get the diagram, Judge. It is upstairs.

By Mr. MEDINA:

Q. I think perhaps it won't be hard for you to make a little diagram of your own right there, showing what these simply articles of furniture were that were in that room.

The COURT. Mr. Correa has asked the F. B. I. representative to see if they can locate one.

Mr. CORREA. I just asked one of the men to go up and get it, Judge.

Q. How many articles of furniture were in that room?—A. Well I shall name them as I recall them; a bed——

168 By the COURT:

Q. Was it a square room or was there anything peculiar about that room?—A. It was approximately square and had one window in it.

Q. How large a room was it?—A. About 10 x 12.

Q. Where approximately was the window?—A. The window was located in one corner, occupying the corner, and keeping the corner from being a ninety degree angle. It was in a corner opening out into a court.

By Mr. MEDINA:

Q. I am not interested myself in that window or door, but I want to know where these pieces of furniture were and how many

there were?—A. Beside the bed, immediately next to the door, there was a small radio table on which was set a radio. Underneath the radio table there was a tin box containing various pieces of shoe shining equipment, and underneath the equipment in the box was the money belt.

Q. You are getting a little ahead of me here. There was a bed and there was a radio table and under that radio table there was a box. Now what other articles of furniture were in there besides these you have already mentioned?—A. Besides the dresser there was a small wastebasket, and on the other side of the dresser near the window there was a bookcase beside which was a
169 chair, and next to the chair there was a built-in cupboard containing clothes and other items, and next to that, between that and the bed here was a table and a small chair, and there were a couple of lamps in there and that is about all the furniture in the room.

Q. You think that table and the small chair could be the one Mr. Willis described to me as a desk?—A. No, sir. There was a larger table which I refer to as a desk, and the radio table was a small table on which the radio was placed.

Q. Now do you suppose that you could just mark on here—suppose there is the door [indicating], with reference to that door could you mark where these pieces of furniture were [handing]?—A. [Witness complies.] That is about it.

170 Q. On this diagram you have marked here, starting at the door and taking these articles in the order in which we go around, a radio table. Now was that radio table something like this table here [indicating]?—A. Similar to it. Probably smaller.

Q. And a little closer to the ground?—A. Just about the same height.

Q. Did it have a drawer to it?—A. No, sir.

Q. Was there any part of it that could be used as a receptacle?—A. No, sir.

Q. And underneath was this tin box that you have described?—A. Sitting on the floor underneath.

Q. That is what I meant.—A. Yes.

Q. It was right on the floor underneath, and I suppose some little space between the under part of the table and the top part of this tin box?—A. As I recall; yes.

Q. Taking the tin box, first when you use the expression "tin box" I kind of think it was a box that you keep valuables or money in.—A. It was a box about the size of a shoe box, had a lid on it just like a shoe box.

Q. It did not look like a box you kept valuables in at all?—A. No sir; just an ordinary shoe box.

Q. An ordinary shoe box to keep shoe materials in. What did you find in there besides this belt?—A. Well,
171 there were cans of shoe paste and rags apparently used for shining shoes, and I believe, I don't recall exactly, there seemed to be a brdush in there; a shoe brush.

Q. Is this belt just the same as it was when you found it in there?—A. It was folded up.

Q. It does not look any different from an article of shoe shining apparatus, does it?—A. I never saw one with a buckle on it.

Q. No; but I suppose excepting for the buckle there the rest of it is about the size and shape of what is used for shining shoes, isn't it?—A. Approximately so.

Q. When you looked in that box did you have any difficulty in finding this belt in there?—A. No; just had to pick out the rags and shining equipment.

Q. And this was right in there with the rags?—A. Yes; down in the bottom.

Mr. MEDINA. I offer this in evidence.

Mr. CORREA. It is in evidence.

Mr. MEDINA. It is in evidence? I thought not. It says "for identification."

Mr. CORREA. Then we offer it, Judge, to be marked as a Government's exhibit.

Mr. MEDINA. Am I to be deprived of the privilege of offering an exhibit, your Honor?

The COURT. I think you offered it first.

172 Mr. MEDINA. I did.

Mr. CORREA. Then I now join in the offer. Could it be marked with a Government number?

Mr. MEDINA. I do not see why it should be. The defendant offers it.

Mr. CORREA. If counsel wishes to be technical about it, Judge, I withdraw that point. I merely indicate that we want to keep it in the custody of the Government.

The COURT. I think it would be better to have the continuity of exhibits.

Mr. CORREA. If counsel wants to be technical about it we will withdraw the request.

Mr. MEDINA. I do not want to be technical, but I think it should be my exhibit.

The COURT. I think it should, and have so ruled.

Mr. MEDINA. I do not wish the custody of it, of course.

The COURT. It would be simpler to have it keep its original number.

Mr. MEDINA. I do not mean that, as long as it is understood it is our exhibit.

The COURT. It will be Defendant's Exhibit A. That is the defendant's first exhibit; is that right?

173 Mr. MEDINA. Yes, your Honor.

(Marked "Defendant's Exhibit A.")

Mr. MEDINA (to jury): Ladies and gentlemen, I wish you would examine that and pass it around.

Perhaps I might proceed even while the jury are examining that. I do not think it would bother them if I went right on.

The COURT. Just as you wish.

By Mr. MEDINA:

Q. Did you find anything else in that box besides the shoe shining equipment and this belt?—A. No, sir.

Q. Now coming to the table which you described as a radio table, did it have a radio on top of it?—A. Yes.

Q. Was there anything, any covering over the table that was under the radio, and between the radio and the table?—A. The sheet of newspaper which has already been introduced in evidence was under the radio.

Q. You mean the one that has been marked for identification?

A. Yes.

Q. That was under the radio?—A. Yes.

Q. Was there anything else between the radio and the table than that paper?—A. I believe there were some other papers, perhaps sheets of toweling paper with some sort of script.

174 Q. So that the radio was resting on some papers, including that sheet of newspaper, that were on top of this table?

A. I do not recall they were under the radio.

Q. What I want to get clear is whether the radio was resting right on top of these papers so that anyone coming in and picking up the papers would see the radio there?—A. Yes.

Q. In other words there was not any cloth over those papers, or any other thing which might conceal them?—A. I do not recall any such cloth.

Q. Your best recollection is that right immediately under the radio were these papers?—A. As I recall now; yes.

Q. Does that cover everything that had to do with the table and the radio and the box under the table?—A. I think so.

Q. Did you try taking the radio apart to see if something was concealed there?—A. I looked inside; yes.

Q. You did not find anything concealed in there, did you?—A. No.

Q. Did you carefully go over the panelling of the room and the bed to see if anything was concealed in the panelling of the room or in the mattress of the bed?—A. Yes.

Q. Did you find anything?—A. No, sir.

175 Q. Did you look in every place that you thought conceivably could be used for purposes of concealment?—A. Yes, sir.

Q. Did you find anything?—A. Nothing other than has been mentioned.

Q. You use that qualifying phrase because the money was in that book, do you not?—A. No, sir; I was just trying to answer your question.

Q. Let me put it in a different way so we will be sure not to have any ambiguity. You did look every place that you could think of in that room that might be used for purposes of concealment, didn't you?—A. That is right.

Q. The panelling, the mattress of the bed, took the radio apart and all that. I say when you did that you did not find anything?—A. Other than has been mentioned; no, sir.

Q. Well the things that you found lying right out in the open as it were you already have described in part, haven't you?—A. Yes.

Q. And as to what was in the tin box, you described that fully, too, haven't you?—A. To the best of my ability.

Q. So that we can leave the tin box and the table and the radio, and if you think of anything later you can come right back

176 to it and tell me there is something you remember, and I will come right back and give you a chance to tell about it so you don't have to worry about that. Now the next item here, following along as we go to the door and turn to the right, you come to the bed, and you state to these gentlemen of the jury there was nothing found in the bed?—A. No.

Q. And you took it all apart and took the bedclothes off and opened up the pillow and opened up the mattress and all that, I take it?—A. We searched the bed; yes.

The Court. What is your answer? Did you take the pillow apart and the mattress apart?

The Witness. No, sir; we didn't go so far as to take the pillows and mattresses apart, although we felt them and bent them and satisfied ourselves there was nothing concealed in there, nor that there had been any recent openings in which anything could have been inserted.

Q. So that while you may not have actually ripped them open you satisfied yourself there was not anything concealed in either the pillow or the mattresses?—A. That is right.

Q. The next items here are this little desk and the desk table. I take it the chair was a wooden chair?—A. Straight back type.

Q. Straight back type. Did you examine that to see
177 if anything was concealed there?—A. Yes.

Q. Did you find anything?—A. No, sir.

Q. As to this desk table, the way you have marked it on your little plan here it looks as though it was just a plain table with a flat top. Is that right?—A. Yes.

Q. And the word "desk" is just a means of identifying it for our purposes here in this case; it did not really look like a desk?—A. It looked like a desk. It had a drawer and had various writing materials and equipment on it.

Q. The writing materials and equipment on top, and the drawer was what led you to describe it as a desk?—A. Yes.

Q. When you went to open that drawer was it padlocked?—A. No.

Q. Was it locked in any way?—A. I didn't search the desk myself. I observed Agent Crow searching that part of the room.

Q. So that you would not want to say about the desk table?—A. Nor the contents.

Q. I better reserve that for Mr. Crow?—A. I think it would be best.

Q. As far as you know, however, there was nothing locked up there?—A. No, sir.

178 Q. That brings us around to the cupboard. Did you examine that cupboard yourself?—A. No, sir.

Q. So that is also something that we can put a "W" for Mr. Wolff on?—A. Mr. Crow.

Q. I beg pardon. I beg your pardon, I am getting a little goofy here. We will put that "C" opposite the cupboard and ask Mr. Crow about it. He would know about the search of the cupboard, would he?—A. I suppose so.

Q. I mean you and he were there?—A. Oh, yes.

Q. And he was the one examined the cupboard?—A. That is right.

Q. That brings us to another chair by the window. Was that an armchair, a stuffed chair?—A. Yes; that was a stuffed chair; an armchair.

Q. This stuffed chair you have marked over here near the window is the one you have in mind now?—A. Yes, sir; that is the one.

Q. Did you search that to see if there was anything hidden in it?—A. Yes, sir.

Q. Did you find anything?—A. No, sir.

Q. Did you make a careful and sufficient search to satisfy yourself there was nothing there?—A. Yes.

Q. That brings us around to the bookcase. You already told the jury you knew the money was in this particular book, so

you had no trouble finding that. Did you look through everything else in the bookcase?—A. Yes.

Q. Did you find anything?—A. Various notebooks, and I believe one of the post cards you have already mentioned.

Q. Were those in general notebooks containing various things that Mr. Cramer had studied in connection with his work in the boiler rooms?—A. Well, some appeared to be and some just ordinary writing. Some were in German, and of course I was not able to tell.

Q. But so far as you could tell they were notebooks having to do with his work?—A. Yes.

Q. And perhaps containing some other writing, too, which I don't question you particularly about. Was the postal card you refer to in one of those notebooks?—A. Yes.

Q. Did you find anything in any of the books that was folded up in there like this money?—A. Nothing other than markers.

Q. That brings us around to the dresser. Did that dresser, in general, contain clothes?—A. Yes, sir.

Q. Were the drawers of the dresser locked?—A. No; they were open.

Q. Was it in one of those open drawers that you found some of these papers that have been identified today?—A. They were open, in that they were unlocked. I found most of those papers in the two top dresser drawers. They were small dresser drawers; they did not extend the entire length of the dresser.

Q. But you had no trouble opening the drawers and seeing the papers right in there?—A. No.

Q. Then you looked in the wastebasket and found the scraps that you put together. Was anything else in there?—A. No, sir.

Mr. MEDINA. I offer in evidence this diagram.

Mr. COMEN. No objection.

(Marked "Defendant's Exhibit B.")

Mr. MEDINA. May I mention this to the jury, your Honor. (To jury): I do not think it is necessary to hand this around, gentlemen. You see here is where the door opened up, and I followed it around this way [illustrating] in questioning the witness. There is where the little radio table was, there is the bed, the desk, the cupboard and the chair near the window, and the bookcase and the dresser and the wastebasket; and back to the door again. If any of you would like to see it more closely I will be very glad to have it passed around. Perhaps I will hand it to the foreman. [Handing to foreman] and if anybody wants it he can look at it.

That is all.

181 WALTER ALLEN CROW, called as a witness on behalf of the Government.

Mr. CORREA. If your Honor please, at this time the Government will offer in evidence Exhibit 31 for identification which has been identified as Kerling's money belt; Exhibit 29, the marine cap found on the Long Island shore; a photograph of Burger's money belt which I shall ask to have marked with the next exhibit number for identification.

(Photograph marked "Government's Exhibit 33-A" for identification.)

Mr. MEDINA. I make the same objection to these that I made this morning when the photographs of the boxes of explosives and matters of that kind were offered, that it is irrelevant and prejudicial.

The COURT. Your exception is noted, Mr. Medina.

Mr. CORREA. Government's Exhibit 33-A for identification is a photograph of an exhibit we had here this morning, which will be no longer available to us here. We are offering the photograph, and I understood this morning there was no objection to the photograph as such, although there may be objection to the exhibit.

Mr. MEDINA. That is right. I object to the exhibit as irrelevant on the grounds previously stated, but I do not raise the question of its being a photograph.

182 Mr. CORREA. Exhibit 33-A is a photograph of Burger's money belt.

The COURT. The objection to that is overruled.

Mr. MEDINA. Exception.

(Government's Exhibits 29, 33-A, and 35 for identification now marked in evidence.)

Mr. CORREA. May these be shown to the jury, your Honor, if they desire to see them.

Your Honor will recall this morning there were two shovels marked respectively "Exhibits 31 and 32" for identification, they being the shovels which were discovered on the beach in Florida, at the place where Kerling and Thiel or near where Kerling and Thiel landed. It was agreed this morning that inasmuch as the physical exhibits would not be present, photographs could be substituted for them, and I should like to offer photographs of those two exhibits as Government's Exhibits 31-A and 32-A.

Mr. MEDINA. I make the same objection, your Honor. Not, however, to the use of the photographs, but to the exhibits themselves, as irrelevant, improper, and prejudicial; and I call your Honor's attention to the repetition and cumulative effect of this evidence.

The COURT. Do you mean the photograph?

183 Mr. MEDINA. No; not because it is a photograph, but these physical articles and things that were referred to in the testimony of Mr. Burger. I raised the question, as your Honor will recall, of their prejudicial character, particularly as becoming repetitious and cumulative, prejudicial, and harmful.

The COURT. I do not think the Government has gone beyond the bounds of propriety with these. The Government must show that these persons charged in the indictment as being enemies were enemies, and the jury has to be convinced of that by proof.

Mr. MEDINA. Your Honor will recall my admission on that subject in my opening, and I made no objections to Mr. Burger's testimony because I felt they were entitled to prove it in some proper way and without undue emphasis and repetition.

The COURT. I will not allow the Government to go beyond reasonable bounds.

Mr. CORREA. We have no intention of doing that, your Honor.

Mr. MEDINA. Of course your Honor realizes my point is those reasonable bounds have long since been passed, and I with the utmost respect except to your Honor's ruling.

(Government's Exhibits 31–A and 32–A for identification now marked in evidence.)

184 Mr. CORREA. If your Honor please, the last is this batch of exhibits which were identified this morning, consisting of photographs of four overseas caps of the Germany infantry which were found in Florida and identified by the witness Burger, and the originals of which, as we explained this morning, are not here. I understand there is no objection to the photographs as such. The exhibit number on these four caps is Exhibit No. 29, one exhibit. They were marked as a single exhibit.

Mr. MEDINA. I think your Honor indulged me this morning in the privilege of having an objection to this particular line noted without repeating it each time.

The COURT. Yes; all that is taking place right now——

Mr. MEDINA. I merely want to protect myself on the record.

The COURT. Yes; but all that is taking place right now is the substitution of photographs for the originals.

Mr. CORREA. Of the four caps, your Honor. We are also marking them in evidence, which we did not do this morning, but which we do now in the light of the further proof which has developed.

Mr. MEDINA. Kindly note my exception.

185 (Government's Exhibits No. 28–A for identification now marked in evidence.)

Mr. CORREA. And the last exhibit is Government's Exhibit 30, if your Honor please, the remaining shovel, that being, if your Honor please, the Long Island shovel identified by the witness Burger.

The COURT. This is the shovel from Amagansett?

Mr. CORREA. Yes, sir. That Burger identified—he being of that group.

(Government's Exhibit 30 for identification now marked in evidence.)

Mr. CORREA (to jury): Exhibit 28-A in evidence, gentlemen, is a photograph of the four caps identified this morning by the witness Burger, and the testimony about it was that they were found in the sand on the beach in Florida.

The COURT. Do you wish to show this to the jury?

Mr. CORREA. I think they have seen it, your Honor. Unless they want to pass it around.

The COURT. They might be interested in seeing it.

Mr. CORREA. I did not know that it was received.

Mr. MEDINA. I think I have noted my objection, and I
186 think the Court has allowed me to have an exception to that whole line of proof.

The COURT. Yes; there can be no question about it.

Mr. MEDINA. Mr. Correa just asked me that. I was not raising it again, your Honor.

Mr. CORREA. I had not shown this exhibit to counsel, your Honor. I take it that it is received.

The COURT. Yes. Mr. Medina, you are quite right; you have a general exception to this testimony.

Mr. CORREA (to jury): Gentlemen, Exhibit 30 as received is one of the three shovels in evidence. For the others photographs have been substituted. I will leave it here; and you may pass it around or do whatever you wish to do.

Direct examination by Mr. BURKE:

Q. What is your occupation, Mr. Crow?—A. I am a special agent of the Federal Bureau of Investigation.

Q. Attached to what office?—A. The New York office.

Q. Did you participate with Special Agent Carden in the search of Cramer's room at 171 East 83rd Street?—A. Yes, I did; on June 28th.

Q. Will you look at Defendant's Exhibit A, the money belt [handing to witness]. Were you present when that was found in Cramer's room?—A. I believe this is the belt which was found when I was present.

187 Q. Is there any way in which you are able to determine whether it is or not?—A. I would say so from the way the seams are sewed and also form. At the time Agent Carden found the belt he placed an appropriate tag upon it, and I now see this tag. So I therefore identify it as the belt which was found.

Q. Where was it found?—A. As Agent Carden described, it was found in this tin box which was located underneath what

your have called the radio table, just to the right of the door as one enters the room.

Q. Were you present when money was found in a book in Cramer's room?—A. I was.

Q. Will you describe that?—A. The money?

Q. Yes.—A. The money consisted of two $20 bills and three $20 bills.

Q. And where was it found?—A. It was found within the pages of a book whose title as I recall was "Knowledge of Music" and that book was located on the central bookshelf.

Mr. BURKE. That is all.

Cross-examination by Mr. MEDINA.

Q. There were two articles on this rough diagram Defendant's Exhibit B which I understand you searched. The first of those is the desk table. Did you examine that desk table?—A. Yes; I did.

188 Q. There was a drawer in that table, was there not?—A. Yes; there was.

Q. Just one drawer?—A. I only recall one drawer; the small one.

Q. On the top of the desk table was there a blotter or some sort of a covering?—A. Well, the obvious thing about the table was that it had a drafting board on top. I believe there was also a T-square and a French curve used in mechanical drawing, and some pencils. So that one had to lift up the drafting board to see the surface of the table itself.

Q. Did the drafting board have a solid body to serve to conceal something it was placed on top of?—A. No; it was an ordinary board.

Q. Did you find anything on top of that table besides the writing articles and the drafting board?—A. Nothing of consequence.

Q. This drawer of the desk, was that locked?—A. No.

Q. When you opened it did you find certain papers in there?—A. I recall seeing pencils in there, I believe. I don't think the drawer even had a lock. I think it was a simple table. At any rate there was no obvious means of concealment or effort to conceal as far as that drawer was concerned.

189 Q. Well did you find anything in that drawer that was handed over later to the Department or to the United States attorney?—A. No; nothing has been handed to him?

Q. So nothing of interest was found in that drawer?—A. That is correct.

Q. As to the cupboard, did you make a careful search of the cupboard?—A. A very careful search.

Q. Did you find anything in there?—A. Quite a good deal.

Q. Were those articles papers or clothing, or what sort of things did you find in the cupboard?—A. Well, both items that you have mentioned. The cupboard can probably best be described as a large Dutch cupboard that was—it was really a closet which was out from the wall, so that it was a separate closet in the corner of the room, the upper part of which consisted of a place where clothing was hung; coats and suits and other things. The lower part consisted of drawers which contained various papers, letters, photographs, and other miscellaneous items.

Q. Were those drawers locked?—A. Oh, no.

Q. They were open just the way the drawers of the dresser were open; were they?—A. Yes.

Q. And whatever papers and photographs and things of that kind were in those drawers in the bottom of the cupboard, they have not yet been identified here but they are in the posses-
1906 sion of the Government?—A. That is correct.

Q. You have heard the testimony given by your colleague, the previous witness, have you not?—A. I did.

Q. Do you corroborate what he says about the search that was made around that bed and so on?—A. I think he covered our search thoroughly.

Q. Yes; and your recollection is just the same as his?—A. In accordance with his.

Mr. MYRICK. That is all.

Mr. CORREA. That is all, Mr. Crow. Thank you.

JOHN G. WILLIS, called as witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CORREA:

Q. Mr. Willis, you are a special agent of the Federal Bureau of Investigation; are you not, sir?—A. Yes, sir.

Q. And on the evening of June 23rd of this year were you at or in the vicinity of the Twin Oaks Inn which has been referred to in previous testimony here?—A. I was.

Q. And at what time during that evening were you there?—A. I was there continually between 8:30 p. m. and 11:30 p. m. in the vicinity or in the Twin Oaks Inn.

Q. Did you at any time in the course of that evening dur-
1791 ing the period you have mentioned, see the defendant Anthony Cramer?—A. Yes, sir.

Q. When and where did you first see him that evening?—A. When I first went into the Twin Oaks Inn.

Q. And the time then was approximately what?—A. Somewhere between 9 and 9:15; that is a rough guess, Mr. Correa.

Q. And where was he in the Twin Oaks Inn?—A. Sitting at a table with two other gentlemen.

Q. I show you Government's exhibits which have been marked in evidence 5 and 6, and ask you can you identify those photographs?—A. Yes, sir.

Q. Are they photographs of the individuals with whom the defendant Cramer was sitting on the occasion you just described?—A. They are.

Mr. Cohen. Referring to the photograph, Exhibit 5, of Edward John Kerling, and Exhibit 6 of Werner Thiel.

The Court. What time did you say you first went to the Twin Oaks Inn?

The Witness. I arrived in the vicinity, your Honor, about 8:20 p. m., or 8:30.

Q. Now, sir, at the time you observed these three men, including the defendant Cramer, sitting in the Twin Oaks Inn, what, so far as your observation went, were they doing?—A. Drinking and talking.

Q. And how long did you observe the three of them there together?—A. Until Kerling left about 9:30, and then
192 Thiel and Cramer were together until they left at eleven.

Q. And did you continue to observe Thiel and Cramer together until eleven o'clock?—A. Yes, sir.

Q. That is, you remained in the restaurant?—A. Either in or outside. I would never stay in all through the evening, Mr. Correa.

Q. But at a point outside from which you were able to observe?—A. Correct; yes, sir.

Q. Now, at eleven p. m. you state Cramer and Thiel left the place?—A. Yes, sir.

Q. And did you observe his movements from that point on?—A. As I repeat, they left the Twin Oaks Inn and walked down to 43rd and Third Avenue, and finally up to 42nd Street in the vicinity of Thompson's cafeteria at East 42nd Street and Lexington Avenue, and Vanderbilt, and they went into the Thompson cafeteria and as previously stated stayed there a while having refreshment, and came out and walked back again and parted finally about 11:30 that night.

Q. During this period, that is, from the time Cramer and Thiel left the Twin Oaks Inn, until they finally parted after leaving Thompson's cafeteria, you were observing them all the while, is that correct?—A. Yes, sir.

Q. And were you in the company of some of these other agents who have testified here, also observing them?—
193 A. Yes, sir.

Q. And did you observe Cramer after he parted from Thiel?—A. Cramer was within my observation from the time he left Thiel until the time he walked in his door at 171 East 83rd Street.

Q. All right. Will you tell us, sir, what he did?—A. At eleven-thirty that night when he left Thiel he walked into Grand Central Terminal and found out that was the wrong entrance to the subway, evidently, because he turned around and walked out and then walked into the next entrance, proceeding by way of the Lexington Avenue subway to 86th Street and walked from 86th Street station to 171 East 83rd Street, which is on the corner of Third Avenue. He arrived there, I imagine, at about 11:45 or 11:50.

Q. Now, sir, I direct your attention to the second day thereafter, June 25th, and to the morning of that day, and I ask you did you see the defendant Cramer in the morning of the 25th day of June?—A. I did.

Q. When and where did you see him, sir?—A. I saw him approximately 10:30 the morning of June 25, 1942, when he walked out of the front entrance of the apartment house at 171 East 83rd Street.

Q. That is, you were stationed outside of the house, is that correct?—A. Yes, sir.

Q. And will you tell us what you observed with respect to the defendant Cramer?—A. I observed Cramer walk up Third Avenue to 86th Street, and turn left on 86th Street and enter the 86th Street branch of the Corn Exchange Bank.

Q. You were in the company of other agents during this surveillance?—A. I was in the company of Special Agent K. R. Routen, and C. L. Green.

Q. By the way, did you observe one of the agents enter the bank after Cramer?—A. Agent Routen followed Cramer into the bank.

Q. You did not, sir?—A. No, sir.

The COURT. Mr. Correa, we will have to suspend now as I have an appointment upstairs. We will adjourn, gentlemen of the jury, until Thursday at half past ten, tomorrow being Armistice Day.

(Adjourned until Thursday, November 12, 1942, at 10:30 a. m.)

195 [Title omitted.]

NEW YORK, *November 12, 1942, 10:30 a. m.*

Trial resumed.

JOHN G. WILLIS resumed the stand.

Direct examination continued by Mr. CORREA:

Q. Mr. Willis, I think on Tuesday you had already testified

concerning your surveillance of the defendant Cramer on the evening of June 23rd; is that correct, sir?—A. Yes, sir.

Q. And I believe we started on the morning of June 25th, which was the second day after that, is that correct?—A. Yes, sir.

Q. You told us, did you not, that you first saw Cramer on that morning at about ten-thirty a. m. when he left his house at 171 East 83rd Street?—A. That is correct.

Q. I am not sure whether you told us what you observed from that point on, or, in any event, would you tell us what you did observe from that point on?—A. He walked directly from his house to the Corn Exchange Bank, 86th Street branch, on 86th Street west of Lexington Avenue. He entered the bank at
196 about 10:50 that morning. I took a position across the street from the bank and Agent Routen followed Cramer into the bank.

Q. And Agent Routen had been with you, I take it, from the time Cramer came out of his house?—A. The agents with me from the time Cramer came out of the house were Agent Routen and C. L. Green.

Q. Now, sir, did you observe Cramer any more that day?—A. Yes, sir.

Q. When?—A. I was with him all that day until about eight thirty that night.

Q. I direct your attention to the evening of that day, and specifically the hour between seven and eight of the evening. When and where did you see Cramer during that hour?—A. At 7:45 p. m. that night he left his home at 171 East 83rd Street and went downtown by way of the Lexington Avenue subway, arriving there about eight p. m.

Q. Where downtown, what station?—A. He got off at the Grand Central terminal and walked up, arriving at East 42nd Street between Lexington and Madison Avenues, where he entered Thompson's restaurant.

Q. That is the same restaurant, I believe, you referred to in connection with your surveillance of the 23rd?—A. Yes, sir; that is the same one. He stayed there a few minutes and looked around, and then came out and walked up to East 44th
197 Street and Lexington Avenue and looked into the Twin Oaks Inn.

Q. That is the same Twin Oaks Inn of which we have heard so much in this case?—A. That is the same one.

Q. Then what did he do?—A. After looking around the Twin Oaks Inn he went back to Thompson's restaurant at East 42nd Street.

Q. And did you see him any more after that that evening?—

A. The surveillance was taken up at that time by Agents Chappelear and Duncan, and I went home.

Q. You did not see him any more that evening?—A. No, sir.

Q. All right, sir. I direct your attention to the 27th of June, and I ask you did you on that day see the defendant Cramer?—A. I did, sir.

Q. And where, sir, did you see him?—A. Coming out of his house.

Q. At what hour of the day?—A. About 10:15 or 10:30 that morning. He got on the subway again, the same subway, and got off at the Grand Central terminal and walked into the Commodore Hotel.

Q. On this occasion, sir, were you alone or were there other agents of the Bureau with you?—A. Agent MacInnes accompanied me.

Q. Did you and Agent MacInnes see Cramer again that day?

A. Yes, sir; we did.

Q. When?—A. I saw him again about 8:55 p. m. that night when he came out of his house again.

Q. Did you see him again on the 26th prior to 8:55 in the evening?—A. No, sir; I did not see him.

Q. Did you see Cramer in the afternoon of that day?—A. No, sir.

Q. Now, sir, you say you saw him at 8:55 in the evening of the 27th?—A. Yes, sir.

Q. And where did you see him?—A. He was coming out of his residence at 171 East 83d Street.

Q. Were there other agents with you at this time?—A. Yes. Agents Duncan, Chappelear and MacInnes.

Q. Will you tell us what you did next?—A. I observed Cramer walk from his residence to the Kolping House at 165 East 84th Street, where he arrived about 9:15.

Q. And did you follow him in?—A. No, sir.

Q. Did you subsequently enter the Kolping House?—A. I did at 11:30 p. m. that night.

Q. And what occurred then?—A. I saw Cramer in the room and I asked him to step outside, where I identified myself, at which time I was with Agents Duncan and MacInnes, and we asked him to come down to the New York office of the F. B. I.; we wanted to talk to him.

Q. Did he do that?—A. Yes, sir.

Q. The New York office was located in this building in which we are now, was it not, sir?—A. Yes, sir.

Q. Did you see him there?—A. I brought him down here, sir.

Q. Did you talk to him here, that is what I mean?—A. Yes, sir. We arrived at 11:20 and I was with him until two a. m. the next day.

Q. In the course of that period of time, from 11:20 approximately on the 27th, evening of the 27th, until two a. m. the morning of the 28th, did you interview Cramer, that is, did you ask him questions and did he make answers to you?—A. Yes, sir.

Q. Now, sir, at the beginning of the interview did you ask him any questions concerning the man in whose company he had been in Thompson's cafeteria on the evening of the 23rd?—A. We did. We asked him who that man was.

Q. And will you tell us what he stated to you at the beginning of the interview on that subject, sir?—A. He told us it was a man named William Thomas, whom he had met in 1929 in Detroit.

Q. And did he say anything else concerning this William Thomas, as he called him?—A. Yes, sir; he said——

Q. Will you tell us what he said, sir.—A. (Continuing.) He became friendly with William Thomas, and they left Detroit about 1930 and continued their acquaintance up in New York City; that in March of 1941 Thomas had gone to the West Coast to take a job in a factory and that the last time he saw him was in June 1942.

Q. Did you ask him any questions in the course of the conversation as to whether or not William Thomas had been out of the United States to his knowledge?—A. Yes. He said that William Thomas had not been out of the United States.

Q. During what period?—A. During the period of his acquaintanceship from 1929 to the time of Cramer's questioning.

Q. Did there come a time in this interview when Cramer stated that he knew that William Thomas was in fact Werner Thiel?—A. Yes; he admitted that fact.

Q. Will you tell me how that came about?—A. We asked him if it was not true that the William Thomas he was telling us about was Werner Thiel and he said yes, it is.

Q. Did you make any inquiry about the use of the name "William Thomas"?—A. Yes; he said that—we asked him why Werner Thiel was using the alias of William Thomas, and he said that Thiel was having difficulty with the draft board.

Q. You then asked him certain questions about Werner Thiel, did you not?—A. Yes, sir.

Q. Again will you tell us, in substance what questions you asked him concerning Thiel, and what answers he made to you?

A. We asked him where he met Werner Thiel, and he said he met him in Detroit in 1929 and that the friend

ship continued when they both moved to New York City and that Werner Thiel had left New York City in March 1941, to take a job on the west coast in a factory.

Q. He said Werner Thiel had left New York City in March of 1941 to take a job in a factory?—A. In a factory on the west coast?

Q. Yes?—A. And that from that time until June of '42 he had not seen Werner Thiel, and the first time he saw him was the night of June 22 or 23, as near as Cramer could recall.

Q. Did you ask him any questions as to whether Werner Thiel had been out of the United States?—A. Yes; we asked him the same question.

Q. As you asked with respect to William Thomas?—A. Yes; repeated the same.

Q. What did he say to that, sir?—A. He said that Werner Thiel had not been out of the United States either.

Q. Now, sir, at this point of the interview did you ask Cramer any questions on the subject of whether or not Werner Thiel had given him anything at any of his meetings with him in June of 1942?—A. Yes sir; we did.

Q. Will you tell us what the defendant Cramer said on that subject at this interview?—A. He said that Werner Thiel 202 had given him a money belt and that Werner Thiel told him that the money belt contained $200 which he wanted Cramer to keep, because Thiel said "I owe you that much money and I want to pay my debt to you." Cramer said he did not count the money, but he assumed Thiel was not lying about the sum, the money in the belt, and that Cramer just took it home and had put it in his shoeshine box.

Q. Did he say anything about whether he was going to use the belt padded with the money for the purpose of shining his shoes?—A. That was not mentioned, sir.

Q. Did you at this time have any discussion with the defendant Cramer concerning his safe deposit box?—A. Yes sir; we did.

Q. Will you tell us just how that subject was brought up and what questions you asked of him on it, and what replies the defendant Cramer made, as closely as you are able to recall it?—A. Well, we wanted to know——

Q. Just tell us what questions you asked him.—A. Yes. We asked him whether he had a safe deposit box at the Corn Exchange Bank at the 86th Street branch and he said he did. We asked him what was in it and he said there was about $3,500 there. We said, "Is it yours?" And he said "It is." We said, "Where did you get that money?" He said, "From the sale of securities on Wall Street." So we said "What securities did you or

203 do you now own?" And he listed a few, and we asked what he had sold and the prices he had gotten for them, and the result did not come anywhere near $3,500. So he continued to explain it by saying that the money had also been accumulated by him throughout a period of saving. So we asked him did he have a savings account in the bank and he said he did. We said "Well why don't you keep your money in the savings account rather than the safe deposit box?" He said, "Well, I feel it is more safe in the safe deposit box rather than being in my bank account."

Q. Would that be substantially what he stated at this stage of the interview concerning the money in the safe deposit box?—A. Yes, sir.

Q. Now, sir, was there a point in the interview—I withdraw that and ask you first were there other agents present who were also participating in this interview?—A. Yes, sir: Agent Ostholthoff.

Q. Was there a point in the interview when the defendant Cramer spoke to agent Ostholthoff alone?—A. Yes, sir; he asked for permission to speak to Ostholthoff alone.

Q. Did they speak together for—how long?—A. Not over five to ten minutes.

Q. After Cramer had spoken to agent Ostholthoff did you again rejoin the interview, sir?—A. Yes, sir.

Q. With Mr. Ostholthoff?—A. I did.

204 Q. At that time did you have any conversation with the defendant Cramer concerning his prior statements, that is his statements up to the time he spoke with agent Ostholthoff alone?—A. Yes; he said that what he had told us about the ownership of the money and Werner Thiel was wrong, but that he wanted to protect Werner Thiel and so he had given us these stories.

Q. You say what he said he had told you about money and Werner Thiel was wrong?—A. A falsehood.

Q. That it was just not so?—A. That is right.

Q. He said the reason was what?—A. That he wanted to protect Werner Thiel.

Q. Did he state protect him from what?—A. He wanted to protect him because Werner Thiel was his friend.

Q. Did he say anything more than that?—A. No, sir.

Q. Did he then make different statements about I will say the money belt first?—A. Yes, sir.

Q. And the money?—A. Yes, sir.

Q. Will you tell us what different statement he made now in this interview you are describing on the evening of the 27th and the early morning of the 28th?—A. With respect to the money belt and the money?

Q. Yes; if you please.—A. He said that Werner Thiel told him at the Twin Oaks Inn on the night of June 23, 1942, that
205 he had a lot of money with him, anywhere from $3,500 to $4,000, and he said "I want a safe place to keep that." So Cramer said, "Well I have got a safe deposit box in the bank you can use," and Werner Thiel assented to this proposal, but he said "Don't put it all in the safe deposit box, keep some of the money out in the event I need it in a hurry."

Q. That is, Thiel said this?—A. To Cramer.

Q. According to Cramer?—A. According to Cramer; yes. So that night on June 23, 1942, Thiel gave him the money belt at the Twin Oaks Inn which Cramer brought home that night or early morning of the 24th and put in a shoeshine box in his room.

Q. This was a money belt containing what, according to Cramer?—A. Yes, sir.

Q. Containing what, I said?—A. Oh, I thought you said "wad."

Q. No.—A. $3,500.

Q. By the way, at this point did Cramer say anything about shining his shoes with the money belt?—A. That was not mentioned.

Q. Was it ever mentioned there at any point?—A. At no point.

Q. Go ahead; I think I interrupted you.—A. Cramer said, "I put the money in the shoeshine box and went to bed," because
206 he had to get up the next day to go to work, and when he returned home the next night of the 24th he took the money out of the belt and counted it, and at this time he divided the money up into the denominations of the bills and the amount of each denomination, putting it on a little slip of paper which he then kept on his person. On the morning of the 25th he deposited $3,500—I withdraw that, he brought $3,500 to [illegible] Street branch of the Corn Exchange Bank and placed it into a safe deposit box, but prior to placing that money in a safe deposit box he paid another year's rent for the box, which was running out on July 3, 1942.

Q. Did he make any statement to you concerning whether or not he had, pursuant to what he told you was Thiel's request to him, held out any of the money?—A. Yes; he did.

Q. What did he say on that subject, sir?—A. He said that he kept part of the money out, something like 100 or 125, in his room, which he placed in a book entitled "Knowledge of Music" in accordance with Thiel's instructions that some money was to be kept in his room in the event Thiel needed it in a hurry.

Q. Now, sir, in the course of this questioning at the interview in the late evening of the 27th and the early morning of the 28th, were there agents present there during the three days or

four days from the 23rd to the 27th who had seen Cramer
207 in the company of the woman?—A. Yes, sir.

Q. Was there any occasion or conversation with Cramer concerning the identity of that person?—A. There was.

Q. Will you tell us what was said by the defendant Cramer on that subject, sir?—A. On the subject of who that woman was with him on the 27th, he said that that was a girl named Norma Kopf, and that Norma Kopf was Werner Thiel's girl friend when Werner lived in New York City, and that when Cramer first met Thiel, Thiel asked him how was Norma.

Q. Go right ahead, please.—A. Thiel said "I would like to see Norma again, could you arrange it for me?" And Cramer said that he would. It was in reply to a letter Cramer wrote to Norma Kopf, who was then in Connecticut——

Q. That is what he told you at this time?—A. Yes. That Kopf came down to see Cramer.

Q. Did he make any statement on the subject of where he was going with Miss Kopf on the day he was observed by the agents?—A. Yes, sir. He was going to Thompson's cafeteria in accordance with a prearranged plan which Cramer had set out in a letter to Werner Thiel which he left at the Hotel Commodore on
208 the morning that we saw him there.

Q. In other words, he was bringing her down to meet Thiel?—A. To meet Thiel.

Q. All right, sir. Now, sir, have you covered substantially all of the points discussed in this interview to which we have referred?—A. Yes, sir.

Q. By the way, sir, had you seen Cramer in company with Miss Kopf at any time during your surveillance?—A. On the 27th, on the afternoon of the 27th at Thompson's cafeteria I saw them together.

Q. I think you omitted to mention that before, sir.—A. I see.

Q. When on the afternoon of the 27th?—A. When he came out of his apartment on the evening of the 27th, about quarter to 4.

Q. About quarter to 4?—A. Then he and Norma went to Thompson's cafeteria, arriving there about 4 to 4.10, and——

Q. And you followed him right from his apartment down to the cafeteria?—A. Yes, and in the cafeteria, that is Thompson's cafeteria.

Q. Did you observe them leave Thompson's cafeteria?—A. Yes, sir.

Q. Where did they go from there?—A. I stayed at Thompson's cafeteria, sir.

209 Q. Now, sir, I show you Government's Exhibit 55 for identification, which consists of a newspaper clipping or a newspaper page, really, and a writing annexed to it, and I ask

you first if you have seen that before?—A. I have seen both of them before.

Q. And referring to the writing annexed to it, was that executed by the defendant Anthony Cramer in your presence?—A. It was.

Q. And he wrote his name to that and the substance of that?—A. Yes, sir; and I witnessed it.

Q. Did he also make any statement to you orally concerning this particular exhibit?—A. Yes. In reply to my questions to him concerning certain ink lines appearing on the paper.

Q. That is in the newspaper; is that correct?—A. In the newspaper.

Q. What did he say as to the ink lines?—A. The question put to him was when he had made those ink lines.

Q. And what was his answer, sir?—A. The first answer was that it was about two years ago; subsequently he changed it to say that it was between one and two years ago—made by him.

Mr. CORREA. If your Honor please, at this time I should like also to offer the writing, which is a part of this exhibit, not
210 for its content at this time but simply as a handwriting standard, and for that purpose only.

Mr. MEDINA. As to the paper, your Honor, I shall have a very serious objection to that which I wish some opportunity to state in due course.

Mr. CORREA. That is not offered.

Mr. MEDINA. I do not understand at this time that any effort is being made to offer any part of the newspaper page. Am I correct about that?

Mr. CORREA. Yes. I think my statement was clear. I am offering the writing as a handwriting standard; not for its contents and not for the paper at all at this time.

Mr. MEDINA. With that limitation I make no objection to that at all, but I did want to have it clearly understood by the Court that as to the other paper I will seriously object in due course.

Mr. CORREA. I suggest that this be marked Exhibit 55-A in evidence; just the writing, because we may offer the other in due course, too.

Mr. MEDINA. May I just read that before it is marked in. It is not the contents, but just let me take a look at it. (After examining.) All right.

(Marked "Government's Exhibit 55-A" in evidence.)

Mr. CORREA. May this paper be marked for identification as the Government's next exhibit.

(Marked "Government's Exhibit 66" for identification.)

211 Mr. CORREA. And also this paper.

(Marked "Government's Exhibit 67" for identification.)

Q. Now, sir; I show you Government's Exhibit 66 for identifi

cation, consisting of this slip of paper with writing in ink on both sides, and ask you first was that paper discussed by you with the defendant Cramer at any time?—A. Yes, sir.

Q. And did he make any statement to you concerning that paper, sir?—A. He said the numerals appearing on it were written by him.

Q. And did he say when or in what connection the numerals appearing on it were written?—A. Yes. This is a paper I referred to previously as having been written by him when he counted the money and set down the different denominations of the bills that Thiel had given to him for safekeeping.

Q. How about the writing on the other side of the paper? Can you tell us what that is and when it was made?—A. The writing is that of Anthony Cramer made at my request, identifying the writing appearing on the other side as having been written by him. It was witnessed by me.

Q. That, I take it, is your signature which appears down in the lower left hand corner: is that correct?—A. Yes, sir.

212 Mr. Correa. I offer in evidence, if your Honor please, Government's Exhibit 66 for identification.

Mr. Medina. No objection.

(Government's Exhibit 66 for identification received in evidence.)

Mr. Correa. May I call the jury's attention to the exhibit, if your Honor please.

Gentlemen: Government's Exhibit 66 in evidence is this slip of paper. I will read the notations, if I may. It reads: "71-50; 5-20's; 10-2's; 8 gold notes."

And then there is a tabulation over here: $3,550, $420 apparently added to that, and then a minus $200 and then what apparently is the total, $3,470.

Q. By the way, did he explain what "71-50" meant?—A. Yes: there were 71 $50 bills in the money belt.

Q. And the "5-20"?—A. Five $20 bills.

Q. And the "10-2"?—A. Ten $2 bills.

Q. And the 8 gold notes.—A. It appears among the $50 bills were 8 gold notes.

Q. Included in the 71?—A. Yes, sir.

Mr. Correa. Then on the other side of the exhibit the statement which the witness has testified he had Cramer

213 write thereon is:

"August 12, 1942. I hereby identify the writing on the back of this page as my own writing. The figures were made by me to indicate the denominations of cash of each bill given to me by Werner Thiel on June 23, 1942, and the amount of each denomination. The total sum according to those figures amounts to

$3,670. Anthony Cramer," and witnessed by John G. Willis, FBI, New York City.

Q. I show you Government's Exhibit 67 for identification which consists of a sheet of graph paper with handwriting on it, and an envelope with handwriting on both sides, and on the outside of the envelope; and I ask you as to that exhibits, first was this discussed by you and the defendant Cramer at any time?—A. Yes; I asked him if he had written it.

Q. And tell us what he said on that subject, sir.—A. He said he had written both the envelope and the note and in confirmation of what he told me, he identified the note and the letter in writing, both of which exhibits are witnessed by me.

Q. At the time you first discussed the note and the envelope with him, let me ask you, did he write on the back of the envelope whatever appears on there?—A. No, sir. That was placed on in my presence at my request.

Q. By Mr. Cramer?—A. By Mr. Cramer.

214 Q. And it is witnessed by you, is it not, sir?—A. Yes, sir.

Q. Now, I refer you to the writing appearing on the bottom of the note under the date August 10, 1942, and ask you did that appear at the bottom of the next one as you discussed the note with the defendant Cramer?—A. No, sir; it did not.

Q. And when was that placed there, if you know?—A. It was placed there by Cramer at my request on August 10, 1942, at the time I showed him that note.

Q. And, in your presence, sir?—A. Yes, sir, and witnessed by me.

Mr. Correa. I offer in evidence at this time, if your Honor please, Government's Exhibit 67 for identification.

Mr. Medina. No objection.

(Government's Exhibit 67 for identification received in evidence.)

Mr. Correa. May I call the exhibit again to the attention of the jury, if your Honor please. Members of the jury, Government's Exhibit 67 consists of an envelope and note. The envelope is, as you see, addressed to "Mr. William Thomas, Hotel Commodore, City," and bears on the back this legend: "August 10, 1942. I hereby identify the handwriting appearing on the opposite

215 side of this envelope as my own. Anthony Cramer." And witnessed by M. R. Griffin——

Q. A special agent of the Bureau, is that correct?—A. Yes, sir.

Mr. Correa. (Continuing.) And John G. Willis, and the note reads (reading to jury).

Then the writing, according to the testimony of the witness, by the defendant under date August 10, 1942 (reading).

Q. Now, sir; I show you Government's Exhibit heretofore marked 63 for identification, consisting of two typewritten pages, and certain handwriting appearing on the back of one of them, and I ask you was that exhibit the subject of discussion between yourself and the defendant Cramer?—A. It was.

Q. And did he make any statement to you concerning it?—A. He said it was a copy of a letter written by him to one Hubert Thielmann on the 21st of April 1942.

Q. And referring to the writing appearing on the back of one of those pages, was that writing made in your presence?—A. It was, sir.

Q. And by whom?—A. By Anthony Cramer, and witnessed by me.

Q. Was that on the occasion when you discussed the exhibit with him?—A. Yes, sir.

216 Mr. CORREA. Now, if your Honor please, I should like to offer in evidence a part of Government's Exhibit 63 for identification, a translation of it, the writing being in German. I should like to offer the translation subject to correction in the event that the defense counsel should take a different view of the translation of the German which was made by our translator. I will offer the whole letter.

Mr. MEDINA. We have a problem, your Honor, about which I think it is better to be perfectly frank as to where the line of demarcation should come in reference to prior communications of one kind or another, such as these letters. Now my own personal thought is that a letter such as this, dated April 21, 1942, is clearly admissible, and I do not object to it. I have the problem as we work back as to where the point should come at which some objection would be sound, and I am frank to say that the only answer I can satisfy myself with is that as we get back of the declaration of war I should object to each of these. I am making this explanation of our position so that your Honor may appreciate it. No objection to this paper.

Mr. CORREA. Does your Honor wish any explanation of our position on this exhibit to come in at this time?

The COURT. I think it would be just as well, to have both views.

217 Mr. CORREA. Well, if your Honor please, our position on this exhibit, as well as on exhibits of a similar nature earlier in time, is that they are probative of the defendant's state of mind and his motive. In other words we take the position that our proof as shown and our further proof will show specific intent on the part of the defendant in connection with the acts of treason which he did. And that I take it as sufficient under

the statute. However in addition to specific intent we will show a motive, the motive consisting of a deep-seated feeling of greater allegiance to Germany in this war than to the United States, and indeed a strong antipathy to the position of the United States in this present war.

I take it that any communications or any writings by the defendant which are expressive of his state of mind and feeling on those subjects are relevant and material here, and I may state to your Honor that indeed it has been so held in one of the few authorities on the subject in this district. I refer to the case of United States v. Fricke, where very similar evidence was offered and received, and the court held it was perfectly proper for the jury to consider it on that issue of motive and intent.

Now I point out further that of course these so-called communications—it is our theory, and it will be more clear when they are all before the Court, as they will be in a moment—are in a sense brought up to date by the latter communication. In other words the whole of them taken together—the three—and we may as well know what we are discussing, because there are three communications involved here—all of them taken together indicate a continuing state of mind over a long period of time. On that theory of course they are most relevant and admissible material.

Another point in connection with these communications which I should call attention to now——

Mr. Medina. If your Honor please, I do not think we should have this sort of argument containing statements of fact. I thought your Honor inquired the position of the Government with respect to the point of time when the inadmissibility would take place. And Mr. Correa has indicated very clearly he thinks there is no limit as to the time. I think further discussion might conceivably be prejudicial.

Mr. Correa. I thought your Honor wanted me to explain our position on these. I wanted to enumerate the reasons, and I think there are several, why these documents are admissible at this time. The last reason to which I am coming is that I think they are relevant on the inducement of the crime. Because our position, as we made it in the opening, is that so far as we know there was no prearrangement or prior notification with respect to Thiel being aided and comforted by the defendant Cramer. Nevertheless we point out that these documents will establish that Cramer's state of mind——

Mr. Medina. I object to this, your Honor. I do not think that is fair. We will have the contents of these papers before the

jury in a minute or so, so any objection I make later will be utterly futile.

Mr. CORREA. Your Honor, I want to be perfectly fair and want to be frank with you and counsel for the defense as to why we think these letters are material and admissible.

The COURT. You would rather have this discussion take place out of the presence of the jury; is that right?

Mr. MEDINA. Well, after what has taken place I am willing to move my good friend Mr. Correa in any discussion before the jury or in their absence. I merely think when we are dealing with the admissibility of papers the contents of those things should not be mentioned in the course of the discussion, otherwise the discussion is futile.

Mr. CORREA. I must confess, your Honor, I do not know, and perhaps counsel does, how we can intelligently discuss the
220 admissibility of the exhibits without knowing what is in them. Because I conceive their admissibility is very largely attendant on what is in them. It is for that reason I feel I have to make these points. I should not have made them except that I got the impression it was counsel's desire and your Honor's desire that we all discuss this thing perfectly frankly and put right out on the table what our various feelings are on the admissibility of these exhibits. I am endeavoring to express mine as well as I can.

The COURT. This particular offer is not objected to?

Mr. MEDINA. It is not objected to, and I only raise the question of date, as to whether there was a date beyond which we ought not to go; and I thought your Honor's question to Mr. Correa was for him to merely indicate his position as to the date. Now he has indicated that and he says there is no limit; no matter how far back they go he objects to any limitation. That we may pass on when the objection is made.

Mr. CORREA. Your Honor, I think I would rather state my position myself. It is certainly not my position that there is no limit. I say there are three specific letters here and that none of them goes beyond the limit of which counsel speaks. I do not think we need to consider other letters; because there is none.
221 The COURT. The offer of this paper is received without objection, I take it.

Mr. MEDINA. There is no objection to it, your Honor.

The COURT. When the precise question is brought up it may be discussed, in the presence of the jury or if you prefer in their absence.

Mr. MEDINA. I think your Honor should decide, and not put upon us or upon the Government the burden of asking that the jury be excused. I do not want them excused, but if your Honor thinks

that they should be because of [illegible] we have that to your Honor to decide.

The COURT. If the Government [illegible] I have no desire to excuse the May.

Mr. CORREA. Your Honor, I have no [illegible] the matter. I would be glad to discuss it with you [illegible] I take it this exhibit meanwhile is received?

The COURT. Yes.

Mr. CORREA. May the two Exhibits [illegible] translation—

Mr. MEDINA. It is satisfactory; yes.

Mr. CORREA. Subject to correction.

Mr. MEDINA. Subject to correction, yes. And I believe
222 these translations are absolutely accurate. If something should be found later on, why, you have given us a little caveat there that we can avail ourselves of in case of necessity.

Mr. CORREA. I ask that the next letter be marked Exhibit 68 A, and I am marking both the original and translation.

(Marked "Government's Exhibit 68 and 68 A".)

Mr. CORREA. If your Honor please, I should like to read [illegible] this to the jury now. I have retained the other two, as it seems to me it is better to read all of them at one time.

May this be marked Government 68, and the translation again, 68 A, for identification.

(Marked "Government's Exhibits 68 and 68 A" for identification.)

Mr. CORREA. May I have this next one marked "Government's Exhibits 69 and 69 A." That is the letter of December 3.

(Marked "Government's Exhibits 69 and 69 A" for identification.)

By Mr. CORREA:

Q. Now, sir, I show you Government's Exhibits marked for identification respectively 68 and 69 [handing to witness]. Each consists of an envelope and two typewritten pages.
223 Let me ask you, sir, did you discuss those exhibits with the defendant Cramer at any time?—A. Yes, sir; I did.

Q. Will you tell us what he said concerning each one, referring to them if you will for the sake of the record by their identification numbers?—A. He said each one had been written by him.

Q. That is, both 68 and 69?—A. Both 68 and 69; 68 to Werner Thiel and 69 to the Heinrich family.

Q. And did he make any writing on them, on the exhibits, or any part of each exhibit, to identify that?—A. These were identified by me on August 12th, by writing—identified by Cramer as his, with my initials "N. Y. D." on them.

Q. That is referring to the letters?—A. Yes, sir.

Q. The first page of each of the letters 68 and 69 for identification?—A. Yes, sir.

Q. Did you not make a similar writing on the back of each envelope?—A. Yes, sir.

Mr. CORREA. If your Honor please, I offer in evidence Government's Exhibit 68 and 68–A for identification, and 69 and 69–A for identification, and "A" exhibits in each case being translations.

Mr. MEDINA. Are these all the letters, Mr. Correa? I understood from what you said a moment ago that they were.

224 Mr. CORREA. Yes, they are all I propose to offer at this time.

Mr. MEDINA. Well, I thought they constituted all the letters and on that basis I was going to withdraw any objection that I had indicated a moment or two ago that I would make. I note that the earliest of these is November 25, 1941.

Mr. CORREA. I do not anticipate, counsel, offering any letter or any writing of the defendant Cramer earlier than that date.

Mr. MEDINA. Very well, then we make no objection to the receipt in evidence of either of these papers.

Mr. CORREA. Oh, excuse me, I do have a postcard, if your Honor please, which at a later time in this case, not through this witness, I propose to offer as the writing of the defendant.

Mr. MEDINA. May I see that a moment, please?

[Paper handed by Mr. Correa to Mr. Medina.]

Mr. MEDINA. Well, I am not going to make any objection to that, either. So we really have no controversy on this point, your Honor.

Mr. CORREA. Then there being no objection these exhibits will be marked.

(Government's Exhibits 68, 68–A, 69 and 69–A for identification now marked in evidence.)

224–A Mr. CORREA. May I call these to the attention of the jury, your Honor.

(To jury:) Ladies and gentlemen of the jury, this first exhibit consists of the envelope and two typewritten pages. One has writing on the back. It is an air mail envelope as you see. I will read the notations [reads from exhibit]. The translation of the letter reads as follows [reads exhibit]:

225 Mr. MEDINA. If your Honor please, I notice that the copy which Mr. Correa has furnished me is verbally quite different from the one he read, and I would like to have it understood that I may read from this copy when I come to comment upon it, although there are slight differences between it and what he has read.

Mr. CORREA. That is true, Judge. I have just noticed that. As

a matter of fact there are two translations made by different translators. As I recall the differences, they are not substantially material.

Mr. MEDINA. No, they are purely verbal.

Mr. CORREA. And I have read the ones that have been marked just for convenience.

Mr. MEDINA. All I want to be sure is that when I read from this it will be all right.

Mr. CORREA. Surely. There will be no difficulty about that at all. Now, gentlemen, the other and second letter is Exhibit 69 and the translation is 69-A, and again they have an air mail envelope and it is dated December 3rd, and a censorship stamp appears on the letter which is dated December 3, 1941 [reading exhibits].

The same is true as to the translation of the letter, I believe.

Mr. MEDINA. Yes.

226 Mr. CORREA. Now the last of those exhibits, Exhibit 63, is a copy of a letter and it is dated New York, April 21, 1942 [reading].

Q. Mr. Willis, I do not know that I asked you before, but after Cramer's apprehension did you go to the Corn Exchange Bank?—A. Yes, sir.

Q. And were you present at any time when Cramer's safe deposit box was opened?—A. I was.

Q. Who else was present on that occasion?—A. Agents Rouse, MacInnes, and Mr. Philip Muller, manager of the branch.

Q. And when was that, sir?—A. The date?

Q. Yes, if you recall. A. (No answer.)

Q. Was it a day or two after Cramer was apprehended?—A. Yes, sir.

Q. May I suggest a date? June 29th?—A. That is it.

Q. Does that refresh your recollection?—A. Yes, sir.

Q. Will you tell us what there was in the box when it was opened in the presence of yourself and these other individuals whom you have mentioned?—A. $3,500 in $50 bills.

Q. Is that all?—A. There was a last year's receipt for the box and an empty brown envelope.

Q. And did you have authority from the defendant Cramer to open his box at that time?—A. Written authority.

Mr. CORREA. You may inquire.

227 Cross-examination by Mr. MEDINA:

Q. Taking matters up right where you left off, Mr. Willis, you know that Mr. Cramer claimed that $200 of that money he was supposed to keep for what Werner Thiel owed him?—A. That is what he told me; yes.

Q. That is what he told you, and that is what you have described to the jury. Now when you went into that safe deposit box; will you tell the jury exactly how you found the money in the box there?—A. Yes, sir; in the brown envelope I mentioned before there was 6 1 850 bills, and in the lower righthand corner there was 5 850 bills, or 4 850 bills, and in the upper lefthand corner there were 4 850 bills or 5 850 bills. I am trying to get across the fact that if there was four in the upperlefthand corner there were five in the lower righthand corner, and if there were four in the lowerrighthand corner there were five in the upper lefthand corner. In other words, there were nine 850 bills lying loose.

Q. So what I wanted to bring out was, there was a place in there where in a separate pile there was 8200?—A. No.

Q. Well, you—A. Oh, yes, sir; in one corner.

Q. You said in one place a pile of four, and in another place a pile of five 850 bills?—A. Yes, sir.

Q. And you were not sure which was which but you were sure one had a pile of four and the other had a pile of five?

228 A. Yes; exactly.

Q. So as I said there was in that safe deposit box a separate pile of 8200?—A. Exactly.

Q. That brown envelope was the one that had the printed name of some Stock Exchange house on it, wasn't it?—A. Yes, sir.

Q. Now I want to go back more or less to the beginning here. Am I right that as far as the FBI men and Government agents were concerned, they first got wind of Mr. Cramer and his dealings, whatever they were, with Mr. Thiel on the evening of the 23rd, that is Tuesday?—A. I will say the first I got wind of it; what the other men knew about it I do not know.

Q. But so far as you know, it was on that evening of Tuesday, the 23rd, that they first had any idea Mr. Cramer was having any dealings with any of these German agents?—A. That is the first night I saw him.

Q. You learned, of course, in that evening that you spoke with Mr. Cramer, that he had seen Mr. Thiel the day before, that is the 22nd, Monday?—A. Yes, sir.

Q. Cramer told you about that when you had him down in the building here in the FBI rooms, didn't he?—A. Yes, sir.

Q. But as far as you know, his telling that to you and the

229 other agents in the FBI room was the first knowledge that the FBI had that there had been any meeting between Cramer and Thiel on Monday, the 22nd of June—as far as you know?—A. That is the first knowledge I had, Mr. Medina.

Q. That is what I mean.—A. I cannot tell what the other men in the FBI had knowledge of.

Q. Well, I realize that; but I say as far as you know today, the knowledge that you got at that interview with Cramer of his dealing with Thiel on Monday, June 22nd, was the first that the Government knew about that?—A. I have never heard anything to the contrary.

Q. Now isn't it a fact also, insofar as your information goes, that it was the men following Kerling on the evening of Tuesday, June 23rd, who went into the Twin Oaks and saw Cramer and noticed for the first time that Cramer was in any way mixed up in this matter—as far as you know?—A. Yes.

Q. Could you tell the jury just when Kerling was arrested? Do you know the exact time?—A. No, sir.

Q. As I recall the testimony on Tuesday, it was some time around perhaps half past ten on Tuesday evening?. Would that be in accordance with your notion of it in general?—A. I do not know, sir.

Q. Do you know when it was that Thiel was taken into custody?—A. No, sir.

Q. My purpose in asking this is that I would like to have the jury understand when Kerling and Thiel were removed from the scene, so we know when there could not possibly have been any more dealings between Mr. Cramer and Thiel, but you do not know as to that?—A. No, sir.

Q. Now as to those statements that were made on Saturday morning after you took Cramer into custody, as I understand your testimony, you talked with him for a while and he tried to make out that this fellow's name was Bill Thomas and things of that sort, but after awhile he told what the fact was?—A. He told who Werner Thiel was, the man he named as Bill Thomas was really Werner Thiel.

Q. Yes. But now what I would like to have the jury understand is about how long it took before he said "Well, I will tell you the truth. His name really was Werner Thiel". Was that a matter of several hours or was it a short time?—A. I arrived at the office that night at 11:20, talked with Cramer, and I left there at 4 o'clock a. m. on June 28, 1942. Cramer during that period of time was given something to eat and he was examined by a doctor; his biography was gone through specially, and it was sometime between 11:20 and 2 a. m. that the incidents I have recounted to Mr. Correa occurred.

Q. I do not think I made myself clear. I realize that it was from sometime after eleven up until two o'clock that the whole business took place, but what I would like to have the jury understand was how long it was after he made the first statement about this Bill Thomas that it took for him to

say, "Well, I will tell you really his name was Werner Thiel"?—A. An hour to an hour and a half.

Q. About an hour to an hour and a half?—A. Yes.

Q. Then there was some further talking before you came to the point where Cramer said, "Now I would really like to see Mr. Ostholthoff alone here." Did that take much longer than an hour and a half?—A. No.

Q. In other words, it was pretty soon after he said, "Well his name really was Werner Thiel," that he said he wanted to see Mr. Ostholthoff alone; maybe a few minutes after that?—A. That is a fair statement.

Q. Didn't you get the impression when he said he wanted to see Mr. Ostholthoff alone that he felt that he wanted to make a full statement to Mr. Ostholthoff, but he did not want to have anyone else there, or something of that kind?—A. No. As a matter of fact I did not know why he would want to speak to Mr. Ostholthoff alone.

Q. It turned out that is what he had in mind?—A. Yes.

Q. That he wanted to make a full statement to Mr. Ostholthoff, and he felt if he was alone with him it would be easier for
232 him to do it?—A. That is the way it turned out, but I did not know what he wanted to see him about at the time.

Q. But that is the way it turned out. Now during this period of talking there did Cramer act at all violent or abusive or anything of that kind?—A. No.

Q. As your experience goes, he was a pretty docile customer, wasn't he?—A. Cramer is phlegmatic.

Q. But as I say, he was a pretty docile customer; he did not make any fuss or any trouble, but you interviewed him and you finally got this statement he gave Mr. Ostholthoff?—A. Yes.

Q. There was one thing that you mentioned that I would like to have a little more explicit. I think you told the jury that his explanation for saying that Thiel's name was William Thomas was that Thiel was having some trouble with the draft board and that is why he wanted to conceal his identity?—A. That is right; that is why he took the alias of William Thomas.

Q. Now I want to bring out a little further detail. Isn't it a fact that Cramer said he had been informed by Thiel that Thiel had not registered for the draft, and that as a matter of fact some F. B. I. people had written to Cramer asking him for Thiel's whereabouts and that he, Cramer, had written in reply stating that he had gone back to Germany?—A. No, sir.

233 Q. When you say "no, sir," to that, do you mean to indicate that at no time during that evening did Cramer indicate to you the nature of this trouble with the draft board?—A. Well, he did elaborate——

Q. Well, that is what I am trying to bring out.

Mr. CORREA. Let the witness answer, please. He started to say "He did elaborate" and you interrupted.

Mr. MEDINA. I did not mean to interrupt at all.

A. (Continuing.) He did elaborate by saying that the draft board was trying to ascertain the whereabouts of Werner Thiel.

Q. And did he not indicate to you that the trouble was that Thiel had not registered for the draft and that is what was making the trouble?—A. Yes.

234 Q. After you had testified for some little time Mr. Correa asked you the question as to whether you had told the jury substantially all of this interview meaning the interview on the evening of the 27th of June with Cramer, and as I remember it you answered it in the affirmative. Is that your recollection?—A. Yes, sir.

Q. Have you told the jury all that you remember that Cramer said during that whole evening?—A. If you mean have I answered fully every question put to me, I say definitely yes.

Q. No; I do not mean that at all. I thought there was probably more to it, and I don't think for a minute you are holding any of this back on purpose, and you know that. But I want to be sure if you told the jury all that you remember that was said by Cramer during that evening.—A. Yes, I have.

Q. Have you told them all that you can remember?—A. All that I can remember sitting right here.

Q. Let me see if I can help you a little; I am not sure that there is anything further, but I just want to make sure. When he asked to be left alone with Mr. Ostholthoff of course you don't know what he said to Mr. Ostholthoff while you were out of the room, do you?—A. No, sir.

Q. And when you came back isn't it a fact that Cramer then made a statement to you and to Mr. Ostholthoff together?—A. He corrected his previous assertions.

235 Q. Well I wish you would tell the jury about that so they will get the full picture of it.—A. Well, he said the man he told us was William Thomas was in reality Werner Thiel, and that Werner Thiel was a friend of his whom he was protecting, and that Werner Thiel had given him $3,500, $3,600 which Cramer was keeping in the safe deposit box, and that it was not from the sale of securities, that the money in fact was not Cramer's but Thiel's.

Q. Did he say why he had made the misstatements that he had made in the beginning?—A. Yes; he said he wanted to protect Werner Thiel.

Q. Was that statement that he made, as you have just told

us, put down in writing?. Didn't you get him to write it out and sign it?—A. Not that night; no sir.

Q. Wasn't there some stenographer or other person taking down what he told you and Mr. Ostholthoff that evening?—A. No, sir.

Q. So that we can leave that with the assurance that you told the jury everything that you can remember about that interview, in substance?—A. Yes, sir.

Q. That is what I want to be sure of. Now there are one or two other things. You may remember that the day before yesterday when I was questioning some of the other agents I had
236 this little diagram Defendant's Exhibit B prepared to show the various articles of furniture in the room?. You remember that, don't you?—A. I do.

Q. And how I went with those two agents over the various items to see what they examined and what they found. Now you may remember I went over and spoke to you about the citizenship papers.—A. I do.

Q. Because I had some recollection that those had been in some way concealed about the room. Now I wish you would tell the jury what the situation was as to those citizenship papers, that not having been touched upon by those two men the day before yesterday.—A. We wanted the citizenship papers, and I asked Cramer where they were and he told me where they could be found, namely under the—in the drawer of the desk on which the drafting board lays, under the paper covering that people usually put in bureau drawers.

Q. In other words he said—if I may push this table (indicating) out by way of illustration—that in that table that was used as a desk there was a drawer, and in the bottom of that drawer there was a piece of paper, and that under that piece of paper he had put his citizenship papers for safekeeping?—A. Yes.

Q. Now when the two men who testified here the day before yesterday made all the search that they did make of his
237 room, they did not at that time know anything about the citizen-ship papers, did they?—A. No, sir.

Q. And so when they got all through with their search and came back they did not have the citizen-ship papers with them, did they?—A. No, sir.

Q. And that is how it was that you took up with Cramer the question of where they were, and he told you they were under the paper. Now isn't it a fact that after that one of the men went back there and he lifted up that paper and found the citizenship papers and brought them down?—A. I don't know. All I know is that I had the citizen-ship papers that day in my hands.

Q. Without making it necessary to call the person who actually did that, it is your information that that is what happened; is that it?—A. Yes, sir.

Q. And I am willing to take that, that one of the agents did go up, he did look where Cramer told him to look under this piece of paper, and there were the citizenship papers and they were brought down to you. Is that right?—A. Yes, sir.

Q. Now a question or two as to these letters that have been put in evidence this morning and I shall be through. I suppose it has occurred to the jury to wonder where on earth these original letters in German with the envelopes addressed to people
238 in Germany—where they came from, how they happened to be available; and I think it would be a good thing if you would tell them just how that happened.—A. Cramer has a post office box in the office of a gentleman named H. B. Goldstein at 304 East 87 Street where he received his mail. On July 27th we got a call from Mr. Goldstein at the office informing us that there were two letters up there, air mail letters which had been returned to the post office box.

Q. In other words they were picked up by the censors and sent back to the United States, and as they came back they went to Cramer who was the man who had sent them?—A. I do not know whether they were picked up by the censors. The service had been suspended. The letters were mailed in New York in November and December, as I recall, and during the process of finding their way to the addressee the service was suspended because of the international situation.

Q. Yes; I notice on each of the envelopes the legend, apparently put on with a rubber stamp, "Returned to Sender—Service Suspended."—A. That is it.

Q. You think it was for that reason rather than that they were opened by the censor?

Mr. MEDINA. May I see the envelopes? I think probably that is right, but I would just like to——
239 Mr. COREY. I think that is right; and I think it was read to the jury when the exhibits were read, if I recall correctly, counselor.

Mr. MEDINA. Well, no. I thought I had a recollection of seeing censorship stamp on them.

The WITNESS. You did, sir.

Mr. MEDINA. And apparently there is.

The WITNESS. Yes.

Q. You see there it is right on that envelope "Opened by Examiner 5-2-38 [indicating]?—A. That is it. I cannot say that it was returned by the censor.

Q. Well they both have on them—you see this one says "Opened by Examiner 5-2 38" the same as the other one. So that whether the censor sent them back or whether the post office did it because the service had been suspended, the fact remains that they were both opened by the censor and that they did come back and that they were not delivered to the addressee in Germany: is that right?—A. I will say that both contained censorship stamps, or censorship pasters, but whether they were opened by the censor or not I am sure I don't know.

Q. I suppose I don't, either, but they have every appearance of having been opened by the censor, don't they?—A. I will say that: yes.

Q. Now go right ahead and explain to the jury what happened after you got that call—from Mr. Goldstein was it?—A. Yes, sir. I went up to his office one of the days and got the letters, which I brought over to Anthony Cramer at the detention headquarters, and he opened them in my presence and read them and they were in German as you see, and I cannot read German. I said I would like to have them and he gave them to me. I brought them to the office and here they are.

Q. You got from Mr. Cramer in accordance with your custom in these matters written permission to take those letters out of the box and bring them down there and use them, didn't you?—A. Written permission from Mr. Cramer to take the letters out of the box?

Q. I thought that you did that.—A. No; they were given to me by Mr. Goldstein, the owner of the box.

Q. In any event you took them up with Cramer and in some way later he consented to your obtaining them, and having the use of them?—A. He opened them, read them, and gave them to me.

Q. I ask you that because you know that under the provisions of the constitution about search and seizure you would have no right really to open those letters without his permission.

Mr. COMERY. Your Honor, I object to this form of interrogation. We have had a lot of it and I have not raised an objection heretofore, but counsel has made a short speech to the witness about why he asked a question, and purporting to set forth a statement of law. I do not think that is appropriate, and I do not know that there is any occasion for us to discuss the law of search and seizure now. I do not think there is and I do not think it is relevant.

The COURT. Did you have that in mind, Mr. Medina?

Mr. MEDINA. I definitely did, your Honor. I should have made some motion perhaps as to these things, but I understood from Mr. Willis that there was not any search and seizure problem

in the case because Cramer had consented to it, and I think I am entitled to bring that out.

By Mr. MEDINA:

Q. It is the fact, isn't it, Mr. Willis?—A. The fact is, as I stated to you, that the letters were given to me by Mr. Goldstein, brought by me to Cramer, opened by him, read by him, and given to me.

Q. Opened by him and given to you?—A. Yes.

Q. That is what I said. The only thing we might differ on is whether there was consent or was not.

Mr. CORREA. I object to that statement, if your Honor please. I do not think it is proper at this time.

Mr. MEDINA. I withdraw it.

Q. Did you later get a signed statement from Mr. Cramer?—A. Concerning what, sir? Concerning those two letters?

Q. No; I mean a signed statement by him in which he related his dealings with these men and the whole story about this matter that we are now trying out here.—A. We got a signed statement concerning his version of the story.

Q. That is what I mean.—A. Yes.

Mr. MEDINA. I call for the production of that statement.

Mr. CORREA. I decline to produce it, if your Honor please, on the ground that it is a self-serving declaration save for a few admissions contained in it, and quite frankly, because I think I should be as frank as counsel has been, in view of the fact, as counsel has indicated, he proposes to call the defendant, I should prefer that the defendant not have the advantage of refreshing his recollection as to what story he gave the FBI before he repeats it here on the stand.

Mr. MEDINA. I most seriously urge my right to that now, your Honor. I have made no engagement as to calling any particular witness. I have stated in my opening what I anticipate, which is correct, but surely I have made no guarantee or engagement on that. Furthermore I think in view of the testimony by this witness here I am entitled to bring out before the jury right now what Cramer's story was to the FBI, and what the writing was that he made. I do not think it is fair to have the jury sitting here waiting until a special and appropriate time to be told the rest of the story as to what he stated. I think that it should come out now.

The COURT. Isn't there something in Mr. Correa's objection that to show this statement now before the defendant takes the stand might refresh his recollection on what he said and enable him to——

Mr. MEDINA. I think he should have thought of that before he put this witness on the stand and brought to the jury's attention a partial statement of what Cramer had stated up to a certain point. If he desired to withhold the rest perhaps he should have withheld this witness.

Mr. CORREA. Counsel's remarks, if your Honor please, about putting in a partial statement and withholding the rest and so forth are just wrong. I have put the witness on to testify to a particular occasion and interview with Cramer. We have elicited from the witness everything that was said at that inter-
244 view by the defendant Cramer, and counsel has explored it thoroughly on cross-examination. Now this is a new matter, another occasion, and for all I know Cramer may have given a dozen different statements. But they are not material here and they are not proper cross-examination. I have carefully restricted it to this single occasion, and I have done it. I am very frank to say that I would not offer in evidence here a statement I did not believe to be entirely complete and accurate.

Mr. MEDINA. I do not think that is a fair statement to make, your Honor. Why should Mr. Correa stigmatize this statement that he refuses to produce as accurate or inaccurate. I move that statement be stricken out.

Mr. CORREA. I thought counsel wanted to know why we did not offer it.

Mr. MEDINA. If your Honor please, I did not inquire as to why they refused to produce it. I demand it now as of right. I do not think it is within your Honor's discretion to refuse me that, in view of the testimony that has been given.

Mr. CORREA. I submit, your Honor, it is new matter, a new occasion, and it is not called for by the testimony.

THE COURT. Mr. Medina, I do not think that was
245 gone into, the contents of this statement, by Mr. Correa. I am not sure about it, but I have listened pretty carefully and I do not think it was.

Mr. CORREA. I will state on the record, your Honor, it was not.

Mr. MEDINA. I respectfully except to your Honor's ruling.

THE COURT. I am not trying to prevent you getting anything that you should have. When we get the testimony I will look it over, and if that is your right you will get it.

Mr. MEDINA. You see my point, your Honor; is that I am entitled to get it now. I say the subject has been opened; I say that it is not within the right of the Government to open a subject in part and then say "All I want is what was said by the defendant on this one occasion on this subject," and stop there. I say no, when they open that I am entitled for the enlightenment of the jury to show them everything the defendant said on the

subject, so that they may not be in the meantime perhaps prejudiced to his disadvantage by the withholding of the rest of the story until a later time, when it may be too late to eradicate some impression from the mind of the juror or of all of the jurors.

246 Mr. CORREA. I submit, if your Honor please, what is sought here is by this attempt to get into evidence self-serving declarations which are hearsay statements as to the case, and on which the Government cannot cross-examine, obviously. I point out further that all the testimony of this witness elicited by the Government has certainly been confined to a single occasion, and as well we have confined our testimony to oral conversations had with the defendant Cramer, not reduced to writing. We have also made no objection to the cross-examination, which has gone considerably beyond the direct examination in many respects, and I made no objection because I have no wish to delay the proceedings by that kind of objection. I do feel that here there is a substantial point, and I think the jury is entitled to have such statement withheld until it can be brought forth at the proper time under circumstances when its truth will also be subject to some check.

Mr. MEDINA. I have this to add, your Honor. Apparently there may be involved some question of good faith here. The suggestion is put forth that perhaps my demand for this paper and my seeking to have it before the jury now may be an indirect attempt to help the defendant with his testimony. I say to your Honor with all the sincerity of which I am capable that I did not make the demand for any such ulterior purpose as that.

247 Mr. CORREA. If your Honor please, so far as counsel's last remarks are concerned, of course there is no question of counsel's good faith. Counsel stands in the same position in this court as any other lawyer representing a defendant. The argument is addressed, as your Honor I am sure realizes, to what I regard as a perfectly sound trial procedure.

The COURT. Mr. Medina, the application is denied at the present time.

Mr. MEDINA. Defendant respectively excepts.

The COURT. It may be appropriate later, and if so renew your application.

Mr. MEDINA. And in doing so I take it I may not be deemed to have waived the position that I have taken here this morning?

The COURT. That is correct, Mr. Medina.

By Mr. MEDINA:

Q. Mr. Willis, after the evening of Saturday, June 27th, did

you again either alone or with other Government agents interview Cramer?—A. Yes, sir.

Q. When was the next interview?—A. Starting 11 a. m. Sunday, June 28th.

Q. Was it on that occasion that the writing which I have requested was obtained from him?—A. Yes, sir.

Q. Before the writing was prepared did he make a
248 statement orally?—A. Yes, sir.

Q. And then the paper was prepared for the purpose of perpetuating in definite and definitive form what he had stated to you and others orally?—A. Yes, sir.

Q. Who else was there besides you—Mr. Ostholthoff?—A. No sir; agent MacInnes.

Q. So that the oral statement to which I now refer was made to you and MacInnes?—A. The written statement.

Q. No; I am referring to the oral statement that was made first. That was made to you and Mr. MacInnes?—A. Of June 28th, is that the one you refer to, sir?

Q. At 11 o'clock in the morning June 28th, a Sunday.—A. Made to MacInnes and I.

Q. What was said by Cramer at that time?—A. He gave his autobiography, his comings and goings to the United States—

Q. I wish you would just tell the jury the whole story. Please don't condense it or characterize it, but give us exactly what he said if you remember.

Mr. CORRIGAN. If your Honor please, I object to this question. I object to the question on the ground, if your Honor please, that this is new matter and not gone into on the direct examination. This interview was not gone into and my reason is essentially
249 the same reason I have heretofore urged in connection with the written statement.

The COURT. This was an oral statement.

Mr. CORRIGAN. It was, if your Honor please.

The COURT. I think we will follow the same procedure.

Mr. CORRIGAN. Well, if your Honor please, this is not an oral statement which was referred to, or elicited by the Government in its direct examination. On the other hand, it is an oral statement which we carefully did not elicit for the same reasons which I mentioned in connection with the written statement. Now it seems to me that the effect of this line, should it be permitted, is merely to permit the defendant to do by indirection what your Honor has expressed as a ruling may not be done directly, and it is for that reason that I object.

The COURT. I think Mr. Medina is right about this. This is an oral statement made. It is not the same one perhaps which

you inquired about but I think that this witness has described one oral conversation and that counsel for the defendant has a right to inquire about another.

Mr. CORREA. On a different occasion?

The COURT. Yes.

Mr. CORREA. If your Honor please, I call your attention to this one final point in connection with it; the witness had started his answer before I interposed my objection. He said that Cramer started with an autobiography, and counsel indicated he wanted to have that autobiography given. It seems to me those statements, as well as the other statements are details which will
250 be elicited with respect to this examination are self-serving declarations; in other words, they are self-serving declarations which are not part of any admissions elicited by the Government, and therefore it seems to me wholly inadmissible. I have no objection to proof at the proper time and in the proper manner, but I think there are real safeguards as to the truth which are lost if the evidence is not introduced in a proper way, and I press the objection on that ground.

The COURT. I think he may go into that.

Q. Go right ahead and tell us the whole story he related in just as exact words as you can give it to us.—A. He started with his birth in 1900 in Ollendorf, Germany, and his boyhood on the farm and his lineage, his parents, his brothers and sisters and his short period of service——

Q. What did he say about his brothers and sisters?—A. He gave us the names and their present occupation and their age——

Q. I do not like to seem to interrupt you, Mr. Willis, but it does seem as though you could tell the jury just what he told you. You see, you are characterizing it.

The COURT. Can you remember it?

The WITNESS. For the life of me, I cannot remember Mr. Cramer's brothers and sisters.

Q. Then it is because you do not have the names. That is all right. I think though you were just sort of summar
251 izing it.—A. I will have to summarize, Mr. Medina, because Cramer's boyhood, although given to me in detail, I have not refreshed my recollection on.

Q. I make no objection to that, Mr. Willis, insofar as you do not remember you may summarize it, but give us all that you do remember.—A. You insist on my beginning at the beginning of the oral statement he gave to me which was later reduced to writing, is that it, Mr. Medina? Or do you care to come to the pith of the argument?

Q. Well, I am exceedingly anxious to avoid any controversy

about it and to have the jury listen to what the man told you. You tell it in your own way, and I will come in afterwards if there is anything about it I think ought to be supplemented.—A. He served a short period in the German army and was discharged after the Armistice and subsequently came to the United States, in 1925 I believe, where he secured employment in the middle West, working in hospitals as attendant, and working on a farm, and he took a trip in 1936, I believe, back to Germany, and while in Germany he visited the Olympic games in Berlin and saw his family. He returned that year and has been in the United States since then. In 1936 he became a naturalized citizen. He continued working in the middle West and prior to that, in 1929, in Detroit, he met Werner Thiel, and they finally moved together to New York City.

252 In 1937 Cramer went to Miami, Florida, and went into business with a Hubert Thielmann, as a partner in a delicatessen store, but the business venture failed and he returned to New York on May 1st, 1937, I believe, and continued his employment in New York.

In March of 1941 Thiel left New York City for the West Coast en route to Germany, and Cramer knew at that time that Thiel was a member of the National Socialist Party.

Then Cramer next heard from him on June 22, 1942, when a note was shoved under his door for him to go to the Grand Central terminal at 8 p. m. that night to meet Franz from Chicago, and Cramer went there, as he said, out of curiosity, and met Werner Thiel.

On June 23rd he met him again——

Q. Didn't he tell you some more about what happened on the evening of the 22nd?—A. They went up to the Twin Oaks and he said they talked about general topics; he asked about Norma; he asked about friends of his. Werner asked him how the war was going and what was the war spirit here. Cramer cannot remember the exact topics of conversation but he characterizes them as general conversation.

Q. Did he say anything about anything that he or Thiel said about how Thiel got over here?—A. Not on the 22nd. On the 23rd he met with Thiel again and, as already in the record,

253 the money phase of this case was brought out: Thiel gave him the $3,500 and Cramer said he asked Thiel if Thiel had come over on a submarine, and——

Q. Now this is Cramer telling you this himself, isn't it?—A. Yes. (Continuing:) And Thiel smiled and put him off and said "I will tell you later." And then we asked Cramer why he should put such a question to Thiel and Cramer said "That is a logical question because steamship service has been suspended and there

would be no other way for Thiel to get over from Germany to the United States except by submarine," and he also said that Thiel mentioned Jacksonville, Florida, and Cramer said it was either that Thiel had landed at Jacksonville or he had come through Jacksonville, he could not remember which.

Q. Now you do not mean to tell this jury, do you, that Cramer told you that Thiel told him that he had come by submarine and landed at Jacksonville? If any such impression might have obtained, you did not mean to say that?—A. That is right. I do not believe I did say it, Mr. Medina.

Mr. CORREA. I object to counsel's statement to the witness because I don't think the witness has said that.

The COURT. I don't think he did.

Mr. MEDINA. It is my misunderstanding, but I merely wanted to have it clear.

254 A. (Continuing.) Cramer said that he asked Thiel if Thiel had come over on a submarine and Thiel smiled and said "I will tell you later." Cramer said he had a hunch that is the way he came over when he saw Thiel smile, but he never admitted to me that Thiel told him he had come over in a submarine.

Q. In fact he denied at all times that he was told any such thing by Thiel?—A. He said all he ever had was a hunch Thiel came over and that hunch was substantiated in his mind when he saw Thiel smile, when he would say "Did you come over by submarine?" and Thiel would smile and say "Don't ask me that. I will tell you later," and Cramer said that hunch of his was substantiated when he saw Thiel's smile.

Q. Go right on and tell us the rest.—A. Thiel asked him if he had seen Norma, and he asked as to her state of health and Cramer said that she was still in town or in the vicinity at least and Thiel said he would like to see her, and Cramer said he would arrange it, and as has been developed, he did arrange for Norma to come to New York City.

Q. Did he tell you why Thiel said he wanted to see Norma?—A. Yes; he would like to see her again, and Norma was Werner's girl friend before he left.

255 Q. And that is what he wanted to see her for?—A. Yes. Then Cramer said that he would never have turned Werner Thiel in because Werner Thiel is his friend and he could never face the world again if he felt that through him a friend had come to grief, but he did say that if he had thought Thiel was over here for some more sinister purpose—I will go back, Mr. Medina. Cramer's hunch why Thiel was here, as given to us, was the fact that Cramer believed Thiel to be here to spread stories and circulate rumors to create unrest, he said if that was so he would never have turned Thiel in because Thiel was

his friend, but he said if Thiel was here for a more sinister purpose, such as sabotage and resultant death to American citizens, he would have turned him in, motivated as much by a desire to protect Thiel as to protect the innocent ones who would be harmed and the damage which would be caused by such violent acts.

Q. Go right ahead and tell us anything that remains.—A. That is about the substance of the statement, Mr. Medina.

Q. And that is what, in substance, he told you and Mr. MacInnes, on that morning of Sunday, June 28th?—A. Yes, sir.

Q. Did you interview him on additional occasions after that?—A. Yes; I did.

Q. Did he change that statement in any way?—A. He elaborated on it.

256 Q. And to what extent did he elaborate on it?—A. I asked him if Thiel had told Cramer how he got from the submarine to the shore and he said that he asked Thiel if Thiel had gotten on a rubber boat from a submarine to be taken into shore, and I said "Why did you ask such a question?" He said "Because that is the logical means of conveyance between a submarine which certainly cannot come onto the dry beach and the shore, but he said that Thiel smiled again and he said "I will tell you later maybe," but he said Thiel never did tell him whether he got from the submarine to the shore by way of a rubber boat.

Q. Were not there some further elaborations?—A. Yes; he elaborated on the reason for protecting Thiel. He elaborated to the extent that he wanted to protect Thiel from the Selective Service violation, his original reason being that he wanted to protect Thiel as a friend. Cramer has always asked me about the status of the $200 which Thiel told him he could keep. He has always elaborated on that to me, too.

Q. I do not understand what you mean by "elaborate." I wish you would explain to the jury what he told you about that.—A. Yes, sir; when Thiel gave him the $3500 or $3670 to be exact, Thiel told him he could keep $200 of it, and Cramer said that that money is his, rightfully his, and each time I saw Cramer
257 he would explain in detail his theory on why that money belongs to him, and asked me about its safekeeping.

Q. Well, didn't he tell you that Thiel owed him that $200?—A. Yes; exactly.

Q. And as I understand what you are saying here is that he got worried about that, and he asked you every time he saw you whether it was not all right for him to keep the $200?—A. No. He would ask me about—he would explain to me the existence of the loans accumulated over a period of years and he would tell me that his theory of it was that that $200 was rightfully his.

Q. But didn't he say that Thiel told him to take the $200 because he owed it to him?—A. Yes.

Q. That is what you said before.—A. That is exactly what I have said.

Q. And so, as I gather, he had some record there that was in your possession, showing the amounts loaned to Thiel, didn't he?—A. He identified records.

Q. He had a little book?—A. Yes.

Q. And you spoke to him with that book right in your hand, didn't you?—A. Yes.

Q. And isn't it a fact that he seemed concerned over the $200 because he did not want to have it taken away from him?—A. Yes.

Q. What did you tell him about that?—A. I told him as far as the $200 was concerned, I was in no position to say whether he could or could not have it, and there the matter rested.

Q. Isn't it a fact during all these times that you had these conversations with Cramer that he did not show the slightest idea of knowing what a jam he was in? Isn't that the real truth of it?—A. Outward manifestations of nervousness, do you mean?

Q. No; I mean in his talking to you. You say he was worried about his $200?—A. He was.

Q. And you have told about these conversations. Now isn't the real basic fact that he did not indicate any idea at all that he was in this kind of jam?

Mr. Correy. I object to the form of the question, if your Honor please.

The Court. Sustained.

Mr. Medina. Exception.

Q. Have you told us all that you can remember about that interview on the morning of Sunday the 28th of June?—A. Yes, sir.

Q. Was there anything else said about submarines at all?—A. No.

Q. In any event; whether there was some further detail or not, the substance of what he then told you about Thiel and the submarine was that from his questions and from the smiles or the responses of Thiel he suspected that Thiel had come over by submarine, but Thiel had never told him that?—A. That is right, and he also suspected something further; he suspected that the money which Thiel gave him was connected in some way with his appearance in the United States which Thiel had never explained to him—according to Cramer. He first said in the early statement that he thought he had gotten the money from the

German government but that he could not have any basis for this information inasmuch as Thiel had never told him where he had got the money, so he rejected that thought.

Q. Now speaking about these thoughts and suspicions, I suppose there were many occasions when you kept pressing him and saying "What did you think the man was here for? Where did you think he got the money? How did you think he got here?" and all this sort of thing—were not those questions put to him repeatedly?—A. Oh, yes; we asked him for that.

Q. And in response to those questions you got the answers that you told the jury here?—A. That is right.

Q. That this was logical, or he thought maybe this was so or that was so, but that Thiel had never told him so?—A. But we never broached the subject about the submarine or the rubber boat.

260 The only questions we asked him on this submarine business was, "Why did you ask Thiel that?" and he was the one who said "That is a logical question." I did not ask him whether Thiel had told him he came over on a submarine. He said he asked Thiel if Thiel came over on a submarine, and Thiel smiled and put him off.

Q. I think perhaps we do not entirely understand one another. I quite realize that you told the jury that Cramer said to you that in his talking to Thiel he asked him—A. Yes.

Q. (Continuing.) Whether he came over by submarine or not, and that Thiel gave him an evasive answer on it. Now referring, however, to these suspicions that maybe the money came from the German government to him, and maybe this and maybe that, were not those speculations all in response to repeated questions by you and the other agents to the effect, "What did you suppose he was here for? Where did you suppose he got the money?" and things of that kind? Isn't that so?—A. Yes. I recollect that is the substance of it.

Mr. MEDINA. If your Honor please, I have a number of notes here that I would like to examine and I notice it is almost one o'clock. I wonder if we could not adjourn now as I will have some further questions I would like to put to Mr. Willis.

The COURT. I should think so. We will adjourn until two o'clock.

(Recess until 2:00 p. m.)

261 AFTERNOON SESSION

JOHN G. WILLIS resumed the stand.

Cross-examination resumed by Mr. MEDINA:

Mr. CORREA. If your Honor please, in the light of your Honor's ruling concerning this interview of June 28th in the afternoon, it

is our feeling that there is no longer any point to our withholding or declining to let counsel have the statement. We are not offering it in evidence or anything of that character, but there is no longer any point to our objecting to that.

Mr. MEDINA. Do I understand that the statement is now made available to me?

Mr. CORREA. It is right there, sir [indicating].

Mr. MEDINA. I offer it in evidence.

Mr. CORREA. I object to it, if your Honor please, on the ground it is a self-serving declaration and should not be admitted at this time. I have no objection to it in proper order, but I feel this is not the order or time, for the reasons I have expressed heretofore and need not repeat.

The COURT. I should think that was a self-serving declaration.

Mr. MEDINA. I except to your Honor's ruling, and I shall
262 proceed along the lines that I was taking this morning, and perhaps I may reoffer it a little later on.

Mr. CORREA. I think it should be marked for identification.

(Marked "Defendant's Exhibit C" for identification.)

By Mr. MEDINA:

Q. Had you told us this morning all that you recalled of the statement made orally to you and Mr. MacInnes by Cramer on the morning of Sunday, June 28th?—A. Yes, sir.

Q. Let me see if I can refresh your recollection as to some things that perhaps you may not have told us all that you may remember. Did he say, that is Cramer say, anything to you on that occasion about his conversations with Norma Kopf?—A. Yes, sir; he said that he told her that Werner Thiel was in town and wanted to see her, and that Norma would not believe it, and he said "Well later you will see I am telling the truth."

Q. Is that all that you can recall that he said about Norma?—A. Yes, sir.

Q. Didn't he tell you anything about what he told Norma Thiel had asked him about her?—A. Will you repeat that, sir?

Q. I will reframe the question. Did Cramer on this Sunday morning tell you what he had told Norma about the questions Thiel had asked about her?

263 Mr. CORREA. If your Honor please, I think I shall have to object again, because I point out that again he has entered the self-serving material and we have had no evidence up to date as to Cramer's conversations about Norma Kopf, and no testimony as to any admissions by Cramer concerning his conversations with Norma Kopf. To permit the subject to be introduced in this way is simply to invite unsworn self-serving declarations, and I do object to that. We made no objection where the

conversations and transactions were involved about Cramer's dealings with Thiel, but this is a whole new subject, not once having been mentioned heretofore.

Mr. MEDINA. Your Honor has ruled this morning that I might bring out what was said by Cramer to the witness. I am thus I think, entitled to bring out everything that he said.

The COURT. I think that applies to a subject that was gone into by the Government, but not to new matter.

Mr. MEDINA. It is my belief that when your Honor ruled that the conversation was admissible, I was entitled to bring before the jury all that he said on that occasion. There is no way of our knowing in advance what it will be or what bearing it will have.

The COURT. I ruled that you were not entitled
264 at this time to go into that new subject, merely because it was part of a conversation.

Mr. MEDINA. I respectfully except.

By Mr. MEDINA:

Q. Do you recall whether or not anything was said in that conversation by Cramer about Kerling?—A. Yes, there was.

Q. What did he say?—A. He said that on the night of June 23rd there this other man sitting at the Twin Orks Inn was a person named "Eddie" that he met two years ago at a Christmas ball at Jaeger's, which is in Yorkville.

Q. Go ahead and tell us all that you remember about it.—A. He said that he expressed the same amazement at seeing Eddie as he did when he saw Werner, for the same reason, that he knew Eddie had gone back to Germany; but that Eddie did not take him into his confidence as to how he got here or why he was here.

Q. Have you told us all that you can recall that Cramer told you that morning about Kerling?—A. Yes, sir.

Q. He did tell you when he first met Kerling, did he?—A. Yes, sir.

Q. That was a couple of yea. before the conversation took place with you?—A. Yes, sir.

Q. Did he tell you whether he knew Kerling well or
265 whether he had not seen him since that occasion two years before?—A. He said he did not know Kerling well, in fact he did not recall the man's last name; all he knew him by was the name "Eddie."

Q. Except for what Cramer said about Norma Kopf, which his Honor has ruled out, have you told the jury all that you recall that Cramer said to you on this Sunday morning?—A. Yes, sir.

Q. I notice, taking the indictment and referring to your testimony this morning, that when you first spoke with Cramer he told

you that Thiel's name was Bill Thomas. Do you remember that?—A. Yes.

Q. Later and either Saturday night the 27th or Sunday morning the 28th he told you that Thiel's name was Thiel, did he not?—A. We asked him wasn't it a fact that Bill Thomas was really Werner Thiel, and he said yes.

Q. But I say either Saturday evening or that Sunday morning he admitted to you that that was wrong, about the name Bill Thomas, and that the man's real name was Werner Thiel?—A. Yes.

266 Q. Now you mentioned that in the beginning he told you that from March 1941 until June 1942, Werner Thiel had been working in a factory on the West Coast of the United States, do you remember that?—A. Yes.

Q. In that same conversation that evening, or at the latest the following morning, he admitted to you that that was not so; didn't he?—A. He admitted that Thiel had left the United States in March of 1941.

Q. That is what I say.—A. Yes.

Q. And that, of course, is different from saying that he had not left the United States.—A. That is right.

Q. The third statement here, and one that I think you testified that Cramer made to you, was that Thiel had not been out of the United States, and as you have just told the jury, on Saturday evening or the following morning he admitted that Thiel had been out of the United States?—A. Yes, sir.

Q. The next one refers to this statement that the money belt given him by Werner Thiel had contained only a couple of hundred dollars that Thiel had owed him. That is what he said at first, wasn't it?—A. Yes, sir.

Q. And then later that same evening, or at the very latest the following morning, he admitted to you that it contained more than the $200 and that it was money he got from Thiel, didn't he?—A. Yes, sir.

267 Q. The final one here has to do with this $3,500 in the safe deposit box that you said he said in the beginning belonged to him, but later that evening or the following morning at the latest he admitted it did not belong to him but that he got it from Thiel and it belonged to Thiel?—A. That is right; yes, sir.

Q. Did you after this oral statement was made to you and to MacInnes, have written out exactly in a written statement what Cramer told you?—A. Yes.

Q. And the oral statement was then incorporated exactly, word for word, as he gave you it, [illegible]

A. Yes, sir.

Mr. MEDINA. I reoffer the written statement, your Honor, and believe that I have laid a sufficient foundation for it; namely, Defendant's Exhibit C for identification.

Mr. CORREA. The same objection, if your Honor please.

The COURT. I think really it is a self-serving declaration.

Mr. CORREA. Yes; and that at this time it is not admissible, although the Government takes the position that it may become admissible at the proper time.

Mr. MEDINA. If your Honor please, we are allowed to
268 have the witness give his oral recollection of what was said. I think the writing, which must be the most accurate statement, should be admissible if we are allowed to put the oral recollection of the witness before the jury, and on what theory can we be prevented from giving the more accurate, permanent record of it in an exhibit?

The COURT. There is one reason. The statement itself is not admissible because it is a self-serving declaration and I have ruled that the conversation may be admitted because the Government offered the conversation on certain subjects only, and on those subjects you have inquired of this witness, but that does not permit the written statement to be put in evidence.

Mr. MEDINA. I am in doubt of your Honor's ruling, and it seems, perhaps, in the way in which you have couched your ruling that you believe this written statement would be admissible if the references to Norma Kopf were omitted from the consideration of the jury. Did your Honor so intend?

The COURT. No, I did not intend to give you that impression.

Mr. MEDINA. So your ruling goes to the statement as a whole?

The COURT. Yes, sir.

Mr. MEDINA. I respectfully except.

269 Q. Mr. Willis, I place before you Defendant's Exhibit C for identification, and in view of your statement that you have exhausted your recollection as to the oral conversation, I ask you now to read the paper for the purpose of refreshing your recollection, and then I shall ask you a question or two more when you have finished?—A. You request that I read it to myself?

Q. Yes.

Mr. MEDINA. Perhaps, your Honor, you will make the same ruling after the witness has read the paper and we might save a little time. My purpose is, after he has read over the paper, to ask him to state his recollection as refreshed, which I am frank to say will bring in inevitably the same thing that perhaps your Honor intends to rule out, and if your Honor tells me in advance that you will rule that out, I will merely note my exception and desist from questioning the witness further on the subject.

The COURT. I should think the witness could refresh his recollection.

Mr. CORREA. Judge, I have not made any objection. I don't know the purpose of this rather gratuitous statement. There has been no objection made as yet and I shall make no objection.

270 Mr. MEDINA. It is going to come out the same way because I am going to follow right down and get it all in.

The COURT. I have ruled that the witness has a right to refresh his recollection.

Q. Now, Mr. Willis, take that first page, so we can take this up carefully and seriatim. Is there anything on the first page that refreshes your recollection as to anything stated by Cramer on that occasion that you have failed to tell the jury about?—A. No; the first page deals with his boyhood in Ollendorf and his family.

Q. And there is nothing there of any consequence that I need stop about now. How about the second page? Is there something on there that refers to a matter that was stated by Cramer on this occasion that you have failed to tell the jury about?—A. Yes. When he went in the delicatessen business in Florida, I said he went down there together with Hubert Thielmann to go into business. As a matter of fact he went with Werner Thiel and the three of them were in business; it was not just Cramer and Thielmann, but it was Cramer, Thiel, and Thielmann.

Q. He told you that he and Thiel, and Thielmann all went into this delicatessen business together, and then that the business failed, as you explained to the jury this morning? Is there anything else on that second page that you omitted to mention?—A. No.

271 Q. Anything on there about Norma?—A. No.

Q. How about the third page?—A. The thing I omitted here was to say that Cramer received a card from Thiel in Tokyo when he went over to the west coast and to Japan en route to Germany.

Q. That was one of the cards that was marked for identification here—A. Yes, sir.

Q. That was Tuesday, and that was found up in the room by one of the witnesses who testified Tuesday, wasn't it?—A. Yes, sir.

Q. Anything else on that third page?—A. He also received a letter from Thiel in Berlin in which Thiel asked him how his girl friend Norma was. I did not mention that.

Q. Thiel referred to Norma as his girl friend?—A. Cramer referred to Norma as Thiel's girl friend.

Q. Was that postal one of the ones found in the room up there?—A. That letter was never found.

Q. Anything else on that page? A. Yes: that Thiel told Cramer that he came from the coast of Florida—and that is the part I left out. I did state that Cramer said he mentioned Jacksonville; it was either that he came from Jacksonville or came through Jacksonville.

Q. Yes; but as you explained to the jury this morning, Cramer did not tell you that Thiel told him that he got
272 off a submarine at Jacksonville?—A. That is right.

Q. He took the position at all times that he at most had a suspicion that Thiel had come by submarine. Is that correct, Mr. Willis?—A. I am sorry.

Q. (Question read.)—A. Yes: that Thiel had told him that he would tell him later maybe.

Q. By the way, when he referred to telling him later, did Cramer say that Thiel had said he would tell him and Norma together later over a glass of wine or something like that?—A. No.

Q. He did not use those exact words?—A. No. He said, "I will tell you later."

Q. What page are you on? Still on number three?—A. I have finished three. There is nothing more.

Q. All right. Then go to number four. A. I did not mention that Cramer thought that whatever Thiel's mission was here, Cramer believed that Thiel was serious in his undertaking.

Q. I do not believe I understand that. It would help if you could read us just the way it is phrased there but I do not want to do it if it is objected to.—A. "My hunch that he was here to spread stories and circulate rumors may have been wrong, but whatever his mission was, I thought that he was serious in his undertaking."

Q. Is that the end of the writing on that part?
273 A. No, sir: "I believed at that time anything that he might undertake would be ineffectual or useless. I told him so at that time. However, I did not advise him not to carry out his plans because I did not know the nature of them."

Q. Did you start reading in the middle of the page there? A. I started in the first paragraph.

Q. Well, I will come back to that later. That is the fourth page?—A. Yes.

Q. Is there anything else on the fourth page that refreshes your recollection as to something you may have omitted this morning?—A. Thiel's membership in the Friends of New Germany, 1934 to 1935, which he left "because I did not like their marching and radical activities."

Q. I thought you used the word "Thiel" there inadvertently?—A. I am sorry. This is Cramer.

Q. In other words, Cramer, in that statement he orally made to you, said he had belonged to that Friends of New Germany out in Indiana in 1934 and 1935, but left the organization because he did not like something or other.—A. "Their marching and radical practices."

Q. Anything else on that page?—A. That the night of June 23, 1942, they made an appointment to meet at the bar in 44th Street; that is the Twin Oaks Inn, at 8 p. m. No." When he left him on June 22nd they made an appointment to
228 A. meet at 8 p. m. at the Twin Oaks Inn on June 23, 1942. I did not mention that.

247 Q. I thought you did, but anyway your recollection is refreshed as to that. Anything else?—A. That Kerling told Cramer that he and Thiel had come over to the United States together. "I am on page 5 now."

Q. I take it what you are doing now is reading over the page and when you come to something that you have forgotten to mention before you are reading it to us?—A. Yes. Cramer also had a hunch that Eddie was here for the same reason that Thiel was, but I did not ask him inasmuch as the previous two times I had asked Thiel why he was here he had put me off with a snub."

Q. I suppose quotation marks out to go around that answer, Mr. Willis?—A. Yes; beginning with "but I did not ask him."

Q. Yes; all that you said was quoted directly from the writing?—A. Yes. It elaborates on the loan, the debt he referred to, the debt between Cramer and Thiel.

Q. Read it to us.—A. "The debt he referred to was a loan of $125 I had made Thiel in 1924 in Hammond, Indiana. Later on in New York I also loaned him more money and we figured that it averaged about $200." He said he thought Thiel might have got the money from the German government, "but I rejected that thought because Thiel was inconsequential insofar as violent
256 acts and deeds injurious to persons and property are concerned." They made an appointment to meet each other at Thompson's cafeteria at 8 p. m. on Thursday, June 25, 1942. Thiel wanted to meet him on the 24th but Cramer said he had work that night so they could not make it, so they made an appointment on the 25th. I failed to mention that.

Q. Anything more on that page that you just turned?—A. No, sir.

Q. Nothing at all about Norma on there?—A. No, sir; nothing I haven't brought out.

Q. That is what I meant.—A. Yes. The $10 that he put in the bank on the 25th was taken from the original sum given to Cramer by Thiel. On June 25th Cramer made a $50 deposit consisting of

$40 in cash and $10 check from Hubert Thielmann, and that $10 was part of the $200 that Thiel told Cramer he could have.

Q. That is, that is what Cramer told you and what appears in the statement?—A. And which I am reading now.

Q. Yes. Nothing about Norma on that page that you have just turned?—A. Nothing I have not brought out.

Q. You know we got to a point there where I asked you about refreshing your recollection about Norma, and you started to testify and objection was made, and the Court ruled it out. You are not imagining that you did answer that, are you? Be-
276 cause there was something that you were going to say—

A. It has been brought out previously, sir, in the introduction of the note left at the Commodore, that Norma would be with him that afternoon.

Q. Yes; that is not what I referred to. But you finish up and then I will come to it.—A. Here it is.

Q. You have found the part about Norma now?—A. "That afternoon Norma and I proceeded to Thompson's cafeteria arriving there about 4 p. m. and leaving about 4.15 p. m."

Mr. CURRAN. Just a moment. This I do not object to, Judge. I think we are coming again into not a conversation between Thiel and Cramer, which as your Honor will note I have not objected to because I went into that subject myself. But I do object to conversations between Norma Kopf and Cramer. The Government will call Norma Kopf and will have the conversations directly, and I submit that is the way to have them and not through self serving and hearsay statements, and not of this nature.

I therefore object to any testimony from this witness as to what Cramer told him concerning Cramer's conversations with Norma Kopf. I do not object to conversations of Cramer with Thiel or conversations with Kerling, or conversations with either
277 Thiel or Kerling about Norma, but I do object to this because Norma Kopf will be here and testify directly to her conversations with Cramer.

Mr. MEDINA. I thought your Honor ruled a moment ago where the references were to Norma Kopf the witness might refer to them and give that to the jury in its entirety.

The COURT. That was not the impression I intended to give you. A letter or statement signed by the defendant is in the nature of a favorable statement as a rule, and that is not admissible unless the door is opened to it. The door has not been opened to that statement.

Mr. MEDINA. That is where perhaps we have our difference. I claim that they did open the door when they asked Mr. Willis

to testify about this conversation. I claim we have got to have it all together before the jury at once.

The COURT. Let me make it a little clearer if I may. The Government went into certain conversations but did not go into the conversation that you are now inquiring about as I recall it.

Mr. MEDINA. But this is one entire conversation. It is not a series of conversations, it is one. I claim it is all admissible if part of it is.

278 Mr. CORREA. Your Honor, first we never went into this conversation and counsel is in error there—referring to the conversation between the witness and Cramer. Secondly we did not go into any discussion had between this witness and Cramer on the subject of Cramer's conversations with Kopf. We asked no question about that, and I submit that that is a subject on which the Government will produce competent and direct proof. The jury may learn from Norma Kopf herself, who will come here and testify directly to what Cramer said to her.

Mr. MEDINA. I was just telling Mr. Minton I only have two ears and can only listen a little bit with each one. I am doing my best.

In the first place I have already indicated to your Honor that we think the whole conversation is admissible. I have this additional comment, that Mr. Minton has drawn to my attention. He has been making his notes here on the direct examination and cross examination of the witnesses, and he has a note here that he shows me, that indicates that Mr. Willis on his direct examination definitely did go into the conversations about Norma. And here it is, if your Honor wants to look at Mr. Minton's notes; they are right here. He did not imagine it.

279 Mr. CORREA. Your Honor, I think counsel misconceives our objection. In fact I am certain he does. We have no objection to conversations that Cramer had with Thiel concerning Norma Kopf. But we do object to conversations which Cramer had allegedly had with Norma Kopf herself. There has been admitted conversations that Cramer had with Thiel about Norma Kopf, in the sense that Thiel asked Cramer to bring Kopf down to see him. We have no objection to that, but we do object to an attempt to put in other self-serving and hearsay unsworn statements, what is in effect Cramer's version of his conversation with Kopf, because that will be testified to directly.

Mr. MEDINA. I would like to just add this, your Honor. If this Kopf woman is going to come and testify very shortly, what earthly harm can it do the Government to have this whole statement come in as it is? Nobody is fooled about it. They know perfectly well it is Cramer's version given to these FBI men.

If they are going to have this Norma Kopf called and she is going to testify, everybody will understand that. As it is in this garbled way it is gotten in, a little here and a little there, and the jury is given that garbled statement. I think they ought to have that statement now and have it read to them now just as it is.

Mr. CORREA. We might just as well, your Honor, put in
280 the defendant's letters to his attorney in a criminal case. I mean I think the whole basis of that is absurd. I think the jury is entitled to have statements before them that are tested and under oath and the reliability of which is vouched for by someone, and not hearsay and self serving statements, unless the hearsay statements are in the nature of admissions, which we contend many of these are not.

Mr. MEDINA. Of course your Honor remembers that the indictment here charges as one of the overt acts this very conversation with this witness Willis. That is one of the things they charge, things that he said there.

Mr. CORREA. If your Honor please, that just is not so. We do not charge this conversation. This conversation is the conversation that took place on the 28th of June in the afternoon. We charge the conversation that the defendant Cramer had with Willis and Ostholthoff, both of whom are named in the indictment, at 11:30 in the evening of the 27th until 2 a. m. in the morning of June 28th, and we charge just that.

Mr. MEDINA. That is right.

Mr. CORREA. And that conversation the witness has testified about fully. The conversation at which this statement was dis-
cussed and the statement prepared was a different subse-
281 quent conversation, and I do not feel it is ever admissible but your Honor ruled against us on that and we have no strong objection. But I think we are now just getting deeper into self serving statements of one kind and another the door to which has never been opened on the examination of this witness.

The COURT. I do not think you need discuss it any further. That statement is a self serving statement on the part of the defendant and it is not admissible at this time. You have been quite successful in getting before the jury certain parts of it.

Mr. CORREA. We made no objection to most of it.

The COURT. So there will be no doubt about it and we need not waste any more time, I will rule that statement is not admissible in evidence at this time, and the conversation, what he said Kopf told him or anything of that sort, is not admissible.

Mr. MEDINA. I object to your Honor's rulings on the several grounds on which you have made them, and I may say I also except to your Honor's statement that I have successfully got before the

jury something that may perhaps lead them to think I am guilty of some improper conduct in that respect.

The COURT. Not the slightest.

Mr. MEDINA. I do not think I have.

The COURT. Not the slightest.

Mr. CORREA. I will say, Judge, we have not objected to most of the points gotten before the jury.

The COURT. The Court has allowed you to do it.

Mr. MEDINA. I will make my final offer of Defendant's Exhibit C for identification. I take it your Honor rules against it, and I take an exception.

The COURT. Yes.

Mr. MEDINA. I may say, your Honor, that a scrutiny of this exhibit makes it very evident that there are many matters here which have got to be shown to them in order for the jury to have a fair statement of what was said. Just look at it yourself.

The COURT. I do not care to see it.

Mr. MEDINA. It will speak for itself, but I thought in fairness to the defendant I ought to bring your Honor's attention to the fact that there are a number of statements here that have not been brought out, that go to modify or extenuate or explain some of the things that are already given in evidence by this witness, and we think we would be prejudiced unless the jury get the picture of it as a whole.

The COURT. You have been allowed to hand that to the witness and he has been permitted to refresh his recollection from it as to what was said on certain subjects.

Mr. MEDINA. But the subjects are in here that nothing has been said about. Well, your Honor has ruled it out and I have taken my exception.

The COURT. You have offered it and you are good enough lawyer to know that a self-serving declaration is not admissible when offered by the person who makes it.

Mr. MEDINA. I also thought I was good enough lawyer to see that if the Government puts in a part of the conversation and there are other parts of that conversation that tend to modify or explain the parts that are in, the whole conversation has to be in in order to have a fair picture.

The COURT. I quite agree with you, but the method of doing it is to ask the witness if this refreshes his recollection and letting him see it; and if he has left something out to state it. I should think that would fully answer the purpose.

Mr. CORREA. If your Honor please, I would just like to clear the record on this. Counsel has stated in the record there are many things in the statement which are not reflected in the testi-

mony of the witness. I should like the record to indicate that counsel has not been in any way hampered in his questioning of the witness along that line, except on that one subject of Cramer's conversations with Norma Kopf. I should also like to
284 point out that counsel's statement is in the record that when the Government puts in a part of the conversation he thinks the defendant is entitled to claim the entire conversation. I should like to point out that statement is in error, that the Government put in an entire conversation and has made no objection to any part of the conversation which the Government put in being introduced on cross-examination. What we have objected to is another and different conversation, on a different occasion, which was never referred to on direct examination and was introduced for the first time on cross-examination. I should like the record to be clear on those things.

285 Mr. MEDINA. Well, it only makes the matter more confusing, your Honor, to refer to it further, it seems to me, but I must add this, that we consider this Sunday morning conversation as a mere continuation of what was said by these men and by Cramer the evening before. They continued right along until two o'clock in the morning, and then he had to get some sleep and they continued right along practically as soon as he got up the next morning, which I think is all right. We do not criticize it, but to say that it is not practically the same continuous course of questioning it seems to us not quite in accord with the facts. However, your Honor has ruled the document out and I have noted our exception. No further questions.

Redirect examination by Mr. CORREA:

Q. Now, sir, you were interrogated this morning concerning your conversation with Cramer on the subject of Cramer's knowledge of how Thiel came here and what his mission was?—A. Yes, sir.

Q. And is it correct, just to summarize what you testified to in that regard, and to be certain we have it right here, that Cramer said in effect that he had a hunch that Thiel came on a submarine?—A. That is correct.

Q. That he had a hunch he came ashore in a rubber boat?—A. From the submarine; that is correct.

Q. And he used that word "hunch" did he not?—A. That
286 is right.

Q. And that he had a hunch that Thiel was here for the purpose of disseminating rumors for the German Government?—A. Yes, sir.

Q. And that he had a hunch that Eddie, that is Kerling, was here for the same reason as Thiel?—A. Yes, sir.

Q. And that he had a hunch that the money Thiel had was related in some way to Thiel's mission, is that correct?—A. Yes, sir.

Q. Am I correct in stating that is the way he put it? He did not say "suspicion," he said "hunch"?—A. Hunch.

Q. Now, some point was made in the questions just before lunch, or at least it seemed to me there was some question as to whether or not the agents who were questioning Cramer had suggested to him that Thiel might have come in a submarine. Now I want to know from you, sir, who first mentioned the possibility that Thiel arrived here in a submarine, one of the agents in the questions to him or Cramer himself in an answer?—A. Cramer told us that he had asked Thiel whether he had come on a submarine.

Q. Was that in response to some question by you or one of the other agents, "Did Thiel say he had come in a submarine?"—A. No. The question put to Cramer was, "Did Thiel tell you how he got over here?" And Cramer said he asked Thiel if he came over on a submarine.

287 Q. Then he said he had a hunch Thiel had come in a submarine from the way Thiel replied?—A. Yes.

Q. And is the same true as to the matter of how Thiel landed from the submarine?

Mr. MEDINA. I move to strike out the part of the answer in response to the question "from the way Thiel replied." My recollection is that the witness testified very explicitly, not that Thiel replied but that he smiled, and because of the smile Cramer got the hunch? Am I right about that, Mr. Willis?"

The WITNESS. No, sir; Thiel replied "I will tell you later."

Mr. MEDINA. Oh, yes. I thought it was the smile. It is both, then?

The WITNESS. Yes.

Q. Is this the fact, that Cramer stated in substance that Thiel's demeanor and his answer led Cramer to the belief that Thiel had arrived here by submarine?—A. Yes. Cramer's very words were that Thiel's smile and putting him off substantiated his hunch.

Q. In other words, he felt that his hunch had been substantiated by Thiel although Thiel did not say "yes" in so many words, is that correct?—A. Yes, sir.

Q. Is the same true, as to Cramer's hunch regarding why Thiel had come over here; that is, that he had come over
288 here, I believe, Cramer stated he told you or believed, Thiel had come over here to spread rumors?—A. Yes. You mean was the thought advanced by Cramer?

Q. Yes.—A. Yes; it was.

Q. That was not suggested to him in any question by you or any of the other agents?—A. No, sir.

Q. You stated, sir, in your cross-examination that Cramer was examined by a doctor on the evening of the 27th or early morning of the 28th?—A. I did.

Q. Is that pursuant to an invariable practice of the FBI when a witness is held overnight?—A. Yes, sir.

Q. And you do that in every case?—A. Every case.

Q. There was no special reason in this case?—A. Absolutely none.

Q. And it is done, so there will be no secret about it, to preclude any claim of a third degree?—A. Third degree.

Mr. MEDINA. I object to that. There is no such claim and I don't think that is proper or relevant.

Mr. CORREA. I think we might as well know why they examine men with a doctor.

Mr. MEDINA. What has that to do with this case, your Honor?

The COURT. I do not believe it is relevant.

Mr. CORREA. It was brought out on cross. I don't
289 know what it has to do with the case either.

Mr. MEDINA. I move to strike out the answer of the witness and object to the question relative to thir practice in other cases, or their practice to avoid this or that, which questions are not in this case.

Mr. CORREA. I will withdraw the whole thing so as to avoid any controversy.

Mr. MEDINA. Then the answer is stricken out?

The COURT. Yes, the answer will naturally go out with the question.

Q. Now, sir, there was some point brought out on cross examination, to the effect that so far as you knew the FBI did not know of Cramer's meeting with Thiel on the 22nd of June. Did you make some such answer as that, sir?—A. Yes.

Q. Until Cramer told them, is that right?—A. That is right.

Q. Now when you first got Cramer in and started to question him, you made it clear to him that during that week, that is the week preceding the 27th of June, he had been under surveillance by FBI agents, did you not?—A. Yes, sir.

Q. And did you indicate to him that that surveillance had started on the 23rd?—A. No, sir.

Actually, so far as you knew, it had, is that right?—
290 A. It had, yes.

Q. But that was not indicated to Cramer?—A. Oh, no, no, sir.

Q. And Cramer told you with whom he had been and where he had been on the 22nd, after you had indicated to him he had been under surveillance, is that right?—A. That is correct.

Q. It was also brought out on your cross-examination that within a very short time after you started to question Cramer, he admitted that the man with whom he had been on the 23rd, was not William Thomas, but in fact Werner Thiel, or rather that William Thomas was Werner Thiel?—A. About an hour and a half after he came in.

Q. And isn't it true, sir, that he did not make that statement until you or the other agents stated to him or asked him specifically, was not William Thomas in truth Werner Thiel?—A. Yes. I recall the question as having been put, isn't it a fact that Werner Thiel is William Thomas?

Q. And he said "Yes, it is."—A. Yes.

Q. And it was at that time he stated, was it not, that the reason Werner Thiel was using the name William Thomas was because of some draft difficulty?—A. Yes, sir.

Q. And immediately after that he went on to explain that Werner Thiel had never been out of the United States, didn't he?—A. Yes.

291 Q. And that he had been out on the West Coast working in a factory?—A. Yes, sir.

Q. And then it was after that that he and Ostholthoff had a conference alone, wasn't it?—A. I believe so; yes; it was.

Q. Was it after the conference with Ostholthoff he said that the reason he made the false statement prior to that conference was to protect his friend, Werner Thiel?—A. That is correct.

Q. He did not mention any draft difficulty in connection with that, did he?—A. No, sir.

Q. One further thing. In your testimony on both direct and cross-examination where you testified that Cramer made statements to you about what he thought concerning Thiel's mission over here or concerning the money or any of these other subjects, was Cramer telling you what he thought at the time you were questioning him, or was he tell you what he thought at the time the events occurred?—A. He was telling us what he thought at the time the events occurred. We were not particularly interested in what he thought then.

Q. In other words, what he thought when he was meeting Thiel?—A. Yes.

Mr. Correa. I have no further questions.

292 Re cross-examination by Mr. Medina.

Q. Mr. Correa has taken you over the ground again of these statements made by Mr. Cramer, and you told the jury on redirect what you recall of it. Isn't it a fact that this paper here is the first written record made of these very statements made to you by Cramer?—A. Starting from the 25th? No, sir.

Q. There is some other writing, is there?—A. My own notes.

Q. And as far as having something that Cramer signed; I mean, this is the first writing in which these statements you have been telling us about were put down in black and white and signed by him, isn't it?—A. Yes, sir.

Q. You had him put his name at the bottom of every one of these sheets of paper here?—A. Yes, sir.

Mr. MEDINA. In view of the redirect examination I re-offer this paper.

Mr. CORREA. Same objection, if your Honor please.

The COURT. Same ruling.

Mr. MEDINA. Exception.

Mr. MEDINA. No further questions.

Mr. CORREA. That is all, Mr. Willis.

293 ALVIN E. OSTHOLTHOFF, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. CORREA:

Q. Mr. Ostholtheff, you are a special agent of the Federal Bureau of Investigation, are you not, sir?—A. I am.

Q. On the night of June 27, of this year, were you present at the offices of the FBI in this building when this defendant, Anthony Cramer, was questioned?—A. I was.

Q. When did that questioning commence, sir?—A. It began at approximately 11:20; that is the time he was brought into the office, and we began the questioning shortly thereafter.

Q. How long did it continue?—A. It continued until approximately two in the morning, two the next morning.

Q. Were you present during that entire time?—A. Yes.

Q. Now, sir, when the defendant Cramer was first interviewed was there any discussion had with him on the subject of a man with whom he had been at Thompson's cafeteria on the evening of June 23rd?—A. Yes, sir; there was.

Q. Will you tell us what, if anything, the defendant Cramer said concerning the identity of that individual?—A. He was asked who the individual was that he was with in Thompson's
294 cafeteria on that date, and he said that that was a man named Bill Thomas. We then asked him who Bill Thomas was and how long he had known him, when he told us that Thomas was a fellow he had first met out in Detroit, Michigan some years before, and had continued in acquaintance with him for some time up until March of 1941 when Thomas had left New York City to go to the West Coast of the United States, and that he had not seen him until shortly before the time that we were talking to him, that is in June of 1942.

Q. Did Cramer make any statement to you in the course of this

interview as to whether or not William Thomas, as he described him, had been out of the United States at any time?—A. He stated that Thomas had not been out of the United States.

Q. For what period of time was this?—A. From the time he knew him until June of 1942.

Q. Now, sir, did there come a time in the course of this interview when defendant Cramer made some different statement as to the identity of the man he had described as William Thomas?—A. Yes, sir.

Q. And will you tell us how that came about and what he said?—A. After we had questioned him about the identity of Bill Thomas and his acquaintance with him, we then asked him if as a matter of fact it was not true that Werner Thiel and Bill Thomas were one and the same person, and at first time he admitted that the person whom he had named as Bill Thomas was actually Werner Thiel.

Q. Did the defendant Cramer say anything at that time to explain why he had referred to Werner Thiel as Bill Thomas?—A. Yes; he said that Thiel had been in some difficulty with the draft board and he was going under an assumed name to avoid that difficulty.

Q. And after that statement did he say anything concerning whether or not Werner Thiel had been out of the United States?—A. Yes; he told us that Werner Thiel had not been out of the United States from 1929 up until the time that we talked to Cramer.

Q. Did he make any statement as to where Werner Thiel had been during the months preceding June of 1942 at that time?—A. Yes. He said that Werner Thiel had been on the West Coast of the United States, and I recall definitely asking him what Thiel had been doing on the West Coast of the United States, and he said that he had been working in a factory out there.

Q. Now, sir, was the defendant Cramer interrogated at this time on the subject of whether or not Thiel had given him any things on the 23rd of June?—A. Yes.

Q. And will you tell us what he said on that subject, sir?—A. He said that Thiel had given him some money at the Twin Oaks Inn, a sum of $200, which was contained in a money belt.

Q. Did he say anything as to what the purpose of this gift or transfer of $200 was?—A. Yes; he said that this was in payment of money that Thiel owed to him; that it was an accumulation of small loans over a period of years.

Q. Now, was there any discussion at this point in the interview

with the defendant Cramer concerning his safe deposit box?—A Yes, sir.

Q And what was that discussion, sir?—A. We asked him if he had a safety deposit box at the Corn Exchange Bank, 86th Street branch, and he replied that he had. He was then asked what the contents of the box were, and he replied that there was approximately $3500 in cash in the safety deposit box. He was then asked if that was his money and he replied that it was. We asked him where he had acquired such a sum of money, and he stated that he had obtained it through the sale of securities.

We asked him to give us a list of the securities he had sold and he named a certain number of stocks he had sold, together with the amount of returns and it was noted that this sum did not nearly approach the sum of $3500 which was in the safety deposit box.

When this was pointed out to him he said that he also put other moneys in there from time to time from
297 his earnings and from other sources that he may have obtained moneys from, pointing out particularly as I recall it, that he had recently received a money order from a man named Thiel Busam, in Chicago, and he said he had received other sums of money such as of that type, which he also put in the safety deposit box.

Q Now, sir, did there come to a point in the interview when the defendant Cramer asked to see you alone?—A. Yes.

Q And he did see you alone, did he not?—A. Yes, sir. The other agents left the room.

Q When you saw him alone did you have a conversation with him?—A. I did.

Q And did he make any statement to you in the course of that conversation concerning the statements he had made to you and the other agents up to that point?—A. Yes, sir; he did.

Q Will you tell us what he said?—A. He stated that up to this point in the questioning he had been lying; that he was doing it to protect his friend Werner Thiel. He said that "I realize that you men know a great deal and that it is useless for me to try to lie any further, so I am going to tell you the truth." He said that first Werner Thiel has been out of the country; he has been over in Germany, and "I know it." He said, "He came to New York from Florida." I asked him if he knew how Thiel
298 had come into the country. He said Thiel had not told him but he felt sure that Thiel had come in on a submarine. I asked him why Thiel was here and he said "I don't know exactly. Thiel told me that he is on a mission for the German Government." I said, "Well, what exactly is the mission?" He said "He has not told me that." I said, "Is he here to commit sabotage?"

He said "I don't know. He has not told me." I said, "Is he here for the purpose of doing espionage?" and he said "He has not told me that." He said, "I think he is here to stir up unrest among the people and probably spread propaganda."

I think that is essentially the conversation I had with him while we were alone. It was a rather short conversation.

Q. But in that he said to you; did I understand you to say, that Cramer stated to you that Thiel had told him, Cramer, that he, Thiel, was here on a mission for the German Government?—A. Yes, sir.

Q. Now, sir, after your conversation with Cramer alone, was there further discussion or conversation with Cramer at which the other agents were present?—A. Yes, sir; there was, for about twenty minutes or a half an hour on that occasion.

Q. By the way, during all this time, except when you and Cramer were alone, was Agent Willis, who has just been identified, also present?—A. Yes, sir.

Mr. CRAMER. You may inquire.

Mr. MEDINA. No questions.

Mr. CRAMER. Thank you, Mrs. Oholthoff.

KENNETH ROUTON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. BURKE:

Q. What is your occupation, Mr. Routon?—A. I am a special agent of the Federal Bureau of Investigation.

Q. Attached to what office?—A. New York.

Q. On June 25th of this year were you in the neighborhood of 86th Street, this city?—A. Yes, sir.

Q. At what time of day?—A. Well, I was there from about 6:30 a. m. up until around 12 o'clock.

Q. And where were you located at first?—A. I was on 83rd Street near 171.

Q. Who was with you?—A. Agent John Willis and Agent C. L. Green.

Q. Will you tell us what you observed at that time?—A. Well, as a matter of fact we were looking for Mr. Cramer and observing his home at 171 East 83rd Street. At approximately 10:30 he left his home and walked up to Lexington Avenue, which would be west, and then walked up Lexington Avenue to the Corn Exchange Bank, at the corner of 86th Street, just west of Lexington Avenue.

Q. You and the other two agents you have mentioned followed him?—A. That is correct, and at the corner of the bank, on reaching the bank he entered the bank. The other two agents remained outside and I followed Mr. Cramer inside the bank.

Q. After you went into the bank after him, what did you observe in there?—A. Upon entering the bank I observed Mr. Cramer filling out what appeared to be a deposit slip or some regular action you would notice in a bank, and after a certain amount of writing he walked over to the deposit window where there was a young lady in attendance and handed her something, which I believed to be a deposit. And after that transaction he turned and walked down the stairs to the lower level of the bank, which is the place where the safety deposit boxes are kept. I watched him until he walked down and turned out of side, and I remained upstairs. Then approximately—oh, he was not there long, fifteen or twenty minutes, maybe not that long, I do not recall exactly, he returned and went out of the bank.

Mr. BURKE. You may inquire.

Mr. MEDINA. No questions.

301 CHARLES M. DUNCAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. BURKE:

Q. What is your occupation, Mr. Duncan?—A. I am a special agent of the Federal Bureau of Investigation.

Q. Attached to what office?—A. Presently attached to the Los Angeles office.

Q. On June 25th of this year were you in the vicinity of Thompson's cafeteria?—A. Yes, sir; I was.

Q. At what time, approximately?—A. At approximately 8:20 p. m. on the 25th I was across the street from Thompson's cafeteria.

Q. That is on East 42nd Street?—A. Yes, sir.

Q. Will you tell us what you observed while you were there?—A. I observed the defendant Anthony Cramer walk across from Thompson's to the Defense Bazaar on the corner of Pershing Square and 42nd Street, and from there he proceeded west on 42nd Street to the rear of the City Library, and continued around strolling through the park and later he returned back, after strolling through the park, back to the front of Thompson's cafeteria at 97 East 42nd Street.

Q. How long did he remain there around the cafeteria?—A. I should say approximately three minutes; from about 9 to

302 approximately three minutes past 9. He stood in front of Thompson's and was looking in through the front window of Thompson's cafeteria.

Q. Then finally what did he do?—A. He then walked east on 42nd Street, down to almost to Lexington Avenue and turned around and walked back to the front of Thompson's cafeteria, stood for about a minute looking in the window again, and then

he proceeded into Grand Central Station, which is the entrance adjacent to Thompson's cafeteria, and took the Lexington Avenue subway north to 86th Street, where he got off and walked up Lexington Avenue to 88th Street to the Kolping House, which is at 165 East 88th Street.

Q. Coming down to the following day, June 26th, in the evening, Mr. Duncan, were you once more in the vicinity of Thompson's cafeteria?—A. Yes, sir. I had been across the street from the residence of Anthony Cramer at approximately 7:40 of that evening, and he had come out of 171 East 83rd Street, his residence, and had taken a Lexington Avenue subway down to Grand Central, and had gotten off and walked up to the front of Thompson's cafeteria and entered the cafeteria.

Q. About what time was that?—A. That was around 7:55 approximately.

Q. Was someone with you at the time?—A. Yes, sir.

Q. Who?—A. That was agent Chappelear; Special Agent C. W. Chappelear.

Q. How long did Cramer remain in Thompson's cafeteria on the evening of June 26th?—A. He was there approximately nine or ten minutes. He had a cup of coffee or something to drink and sat at a table alone.

Q. After he came out of there what did he do?—A. When he came out after being in about ten minutes he walked east on 42nd Street down to Lexington Avenue and up to the Twin Oaks Inn at 44th and Lexington, where he stayed about a minute. He did not sit down, but merely walked in and turned around and came out again and walked back to Thompson's cafeteria.

Q. Then what did he do there at Thompson's cafeteria again?—A. He stood there and looked into the windows through the front, apparently looking over the entire cafeteria, and then he walked back into the Grand Central station and took a subway to 86th Street.

Q. Did you continue to observe his home thereafter that evening?—A. Yes, sir. He went from the 86th Street station of the Lexington Avenue subway and walked to his home to 171 East 83rd.

Q. Did there come a time later in the evening when he came out of his home again?—A. Yes, sir; about 10:15 to 10:18 he left his home and came out with a woman.

Q. And where did he go?—A. He and the lady walked down to Third Avenue on 83rd Street, walked up Third Avenue to 88th and into the Kolping House at 165 East 88th Street.

Q. Will you look at this piece of paper Exhibit 66 in evidence, a

slip with notations of numerals on it [handing to witness]. Have you ever seen that before, sir?—A. Yes, sir.

Q. Where did you first see that and under what circumstances?—A. On the night of June 27th, after Cramer had been brought to the New York field division of the FBI office, some time after he was in the office, some time after 11:20, his personal belongings were turned over to the agents including myself, and that notation—the piece of paper with the notations on it was turned over among those things.

Mr. BURKE. You may inquire.

Mr. MEDINA. No questions.

JOHN A. O'BRIEN, called as a witness on behalf of the Government being duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

(Page of book marked "Government's Exhibit 70" for identification; two cards marked Government's Exhibits 71 and 72 for identification.)

Q. Mr. O'Brien, what is your occupation?—A. Superintendent of the safe deposit vault, Corn Exchange Bank.

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Q. What branch of the Corn Exchange Bank?—A. 86th Street.

Q. I show you a book marked Government's Exhibit 70 for identification [handing to witness], and ask you whether this book is a record produced by your bank pursuant to subpoena?—A. Yes, sir.

Q. Is this one of the records of your bank kept in the regular course of business?—A. Yes, sir.

Q. What kind of a record is it?—A. It is a record made of payments on the safe deposit boxes.

Q. Does that book contain a sheet relating to an Anthony Cramer or A. Cramer?—A. This is a receipt given, indicating

Q. There is a receipt in this book relating to an A. Cramer?—Yes, sir.

Mr. GOODKIND. I offer this page of the book marked Exhibit 70 for identification.

Mr. MEDINA. No objection.

(Government's Exhibit 70 for identification marked in evidence.)

Q. Mr. O'Brien, will you look at the pages of this book marked Government's Exhibit 70 in evidence, and I ask you whether there is on there an entry relating to a transaction with A. Cramer?

A. Yes, sir.

306

Q. Was that entry entered on the book by you?—A. By me; yes, sir.

Q. What transaction does it represent?—A. It is the payment of the safe deposit vault in advance.

Q. Did you see Anthony Cramer?—A. Yes, sir.

Q. When was that?—A. On the 25th of June

Q. And where?—A. At the Corn Exchange Safe Deposit Company, 126 East 86th Street.

Q. Where in the bank was he?—A. Down in the vaults; down two flights of stairs.

Q. Down the stairs in the safe deposit vaults?—A. Yes, sir.

Q. And you were there?—A. Yes.

Q. What happened on that occasion?—A. He came in and wanted to pay his rent on the box. He gave me the money and I made out the receipt and he signed it.

Q. At that time did he have a box which he rented?—A. Yes, sir.

Q. What was the box number?—A. 1254.

Q. Did he at that time renew his rental?—A. Yes, sir.

Q. Did he pay you?—A. He paid me the money; yes, sir.

Q. How much?—A. $6. Yes; $6; correct.

Mr. GOODKIND. With the consent of the defendant I will substitute a photostat of the page of that exhibit.

Q. Mr. O'Brien, I show you a card marked "Government's Exhibit 71" for identification [handing to witness], and ask whether that also is a record of your bank produced pursuant to subpoena?—A. Yes, sir.

Q. Is that a record kept in the regular course of business?—A. Yes, sir.

Q. What kind of a record is it?—A. Showing when the payments are due and when they are paid.

Q. What do you call it?—A. A ledger card.

Q. For a safe deposit box?—A. Yes, sir.

Q. Is that a ledger card relating to Anthony Cramer?—A. Yes, sir.

[Mr. Goodkind shows card to Mr. Medina.]

Mr. MEDINA. No objection.

Mr. GOODKIND. I offer it in evidence as Government's Exhibit 71.

(Government's Exhibit No. 71 for identification now marked in evidence.)

Q. Mr. O'Brien, does Government's Exhibit 71 in evidence show that Anthony Cramer rented a safe deposit box in your bank?—A. Yes, sir.

Q. On any particular date?—A. On July 3, 1941.

Q. Does this also show a renewal of the rental?—A. Yes, sir.

Q. On what date?—A. June 25, 1942.

Q. Does it show the number of the box?—A. Yes, sir.

308 Q. What is the number?—A. 1254.

Q. Mr. O'Brien, I show you a card marked Government's Exhibit 72 for identification [handing to witness], and ask you whether that is a record of your bank produced pursuant to subpoena?—A. Yes, sir.

Q. Also a record kept in the regular course of business?—A. Yes, sir.

Q. What kind of a record is that?—A. That is a signature card.

Q. A signature card for the safe deposit box?—A. For the safe deposit box.

Q. Is that a record relating to an Anthony Cramer?—A. Yes, sir.

[Mr. Goodkind hands card to Mr. Medina.]

Mr. MEDINA. We make no objection. We have been talking here about some little entry that may have been put on afterwards and if so it can easily be explained. We make no objection whatever.

Mr. GOODKIND. I offer Government's Exhibit 72.

(Government's Exhibit 72 for identification now marked in evidence.)

Mr. GOODKIND. With the leave of counsel I substitute photostats of both exhibits 71 and 72.

Mr. MEDINA. Very well.

Mr. GOODKIND. You may inquire.

Mr. MEDINA. No questions.

309 PHILIP MULLER, Jr., called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Mr. Muller, what is your occupation?—A. Banking.

Q. Where?—A. Manager of the Corn Exchange Bank Trust Company, 86th Street branch.

Q. Does that bank have safe deposit boxes?—A. It does.

Q. Did this defendant Anthony Cramer have a safe deposit box in your bank?—A. He did.

Q. Were you present on any occasion this summer when that box was opened?—A. I was.

Q. Was that on or about June 29th?—A. That was on June 29th.

Q. Were there agents from the Federal Bureau of Investigation there at the same time?—A. There were.

Q. What happened on that occasion?—A. Well, Agent Willis, I believe, presented an authorization signed by Mr. Cramer to allow him to get at the box and remove the contents thereof.

Q. Did you then go down to the vault?—A. Mr. Willis and I believe two other agents and myself went down to the vault.

Q. Did you get out the box?—A. We got out the box.

Q. Was that box No. 1254—A. Yes, sir

310 Q. Was it then opened in your presence?—A. The outer section was opened and the tin—

Q. I did not hear what you said.—A. The outer lock was opened and the tin container taken out and taken to a booth in the presence of the agents and myself, and in the booth the box was turned over to Mr. Willis, who opened it——

Q. In your presence?—A. In all of our presence.

Q. And what was found inside the box?—A. There was $3,500 in cash and a safe deposit rent receipt.

Q. In what form was the $3,500 in cash?—A. All in $50 bills.

Mr. GOODKIND. You may inquire.

Mr. MEDINA. No questions.

CATHERINE O'MEARA, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Miss O'Meara, you are a mail clerk employed at the Commodore Hotel in New York City?—A. Yes, sir.

Q. And you were so employed in June of this year?—A. Yes.

Q. I now show you Government's Exhibit in evidence No.

311 67, being an envelope clipped to a note, as to which there is previous evidence that the note was contained in the envelope [handing to witness], and ask you whether you have ever seen this before?—A. Yes; I saw that envelope before—A man left it at the hotel.

Q. You have seen this note before at the hotel?—A. Yes.

Q. I indicate to you on the envelope some writing in pencil, and I ask you whether that was put on there by you?—A. The man left it at the information desk and when I got it he was not registered, and I put "Not registered" with my initials and I filed it away at the mail desk.

Q. This pencil notation, what are the letter "N. R."?—A. "Not registered" and the "K" is my initial.

Q. That means you could not find the addressee of the note registered at the hotel; is that correct?—A. That is right.

Q. You then put the message in the uncalled-for-messages box?—A. In that mail basket.

Mr. GOODKIND. You may inquire.

The COURT. To whom is that note addressed?

Mr. GOODKIND. This is addressed to Mr. William Thomas, Hotel Commodore, City. Government's Exhibit 67 in evidence.

Mr. MEDINA. No cross-examination.

312 FLORENCE E. SMITH, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Miss Smith, are you also a mail clerk employed at the Hotel Commodore, New York?—A. Yes.

Q. And you were so employed in June of this year?—A. Yes.

Q. I show you Government's Exhibit 67 in evidence, a note and an envelope attached thereto [handing to witness], and ask you whether you have seen that before?—A. Yes.

Q. I indicate two time stamps on the back of the envelope and ask you when you saw it before?—A. The time stamp is stamped at the desk, but I don't see it when the time stamp is put on.

Mr. MEDINA. I do not know that the jury can hear. I cannot hear a word.

The WITNESS. The time stamp is stamped by the girl who takes it in: takes the note in. It is stamped by her and filed at my window.

Q. The first time stamp appearing on this envelope is June 27th?—A. 10:49.

Q. 10:49 a. m. There is a second time stamp, is there not?—A. Yes.

Q. June 30?—A. Yes.

313 Q. Is that the date this note came to your attention?—A. Yes; I presume it is.

Q. What did you do with it?—A. There was a guest by the name of William Thomas registered and I sent it up to that room. The figures are on there.

Q. On June 30th you found a guest named William Thomas registered in the hotel; is that right?—A. That is right.

Q. What room did you send it to?—A. 282.

Q. That is the notation appearing on the envelope?—A. That is right.

Q. Did you see the note again?—A. When it came back from the girl on that floor.

Q. That is the note came back after you sent it up?—A. That is right.

Q. What did you do with it then?—A. Filed it then.

Q. Filed it in the uncalled for messages box?—A. That is right.

Mr. GOODKIND. You may inquire.

Mr. MEDINA. No questions.

(Adjourned to Friday, November 13, 1942, at 10:30 a. m.)

314 [Title omitted.]

NEW YORK, *November 13, 1942;*
10:30 o'clock, a. m.

Trial resumed.

ROBERT F. CARNEY, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Mr. Carney, what is your occupation?—A. Assistant manager of the Hotel Commodore.

Q. And did you hold that position in July of this year?—A. I did.

Mr. MEDINA. I did not quite get what his occupation was.

The WITNESS. Assistant manager of the Hotel Commodore.

Q. I show you Exhibit 67, a Government exhibit in evidence, being a note attached to an envelope addressed to Mr. William Thomas [handing to witness], and ask you if you have seen that before?—A. I have.

Q. Where did you see it before?—A. At the hotel.

Q. Where was it in the hotel?—A. It was filed in the uncalled for messages.

315 Q. About when did you see it?—A. Some time around the middle of July, I think it was.

Q. And what did you do with it?—A. I gave it over to FBI Special Agent Condon, I believe his name is.

Mr. GOODKIND. You may inquire.

Mr. MEDINA. No questions.

JOSEPH E. CONDON, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. GOODKIND:

Q. Mr. Condon, what is your occupation?—A. I am a special agent of the FBI.

Q. Assigned to the New York office?—A. That is right, sir.

Q. Mr. Condon, I show you Government's Exhibit in evidence No. 67 [handing to witness] and ask you whether you have seen that before?—A. I have, sir.

Q. And where and when?—A. I saw that exhibit at the Commodore Hotel on the 17th of July, 1942.

Q. And was it at that time turned over to you?—A. It was, sir.

Q. By the assistant manager of the Commodore?—A. By the assistant manager Mr. Carney.

Mr. GOODKIND. You may inquire.

316 Mr. MEDINA. No questions.

LEONARD HIGDON, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. BURKE:

Q. Mr. Higdon, what is your occupation?—A. I am a hair and fiber analyst.

Q. Hair and fiber analyst?—A. Yes.

Q. Employed by whom?—A. By the Federal Bureau of Investigation.

Q. And where is the place of your assignment?—A. Washington, D. C., technical laboratory.

Q. The technical laboratory?—A. Yes, sir.

Q. What are your duties in connection with that assignment?—A. Well, I analyze physical evidence, principally evidence dealing with hairs and fibers.

Q. In connection with criminal investigations?—A. Yes, in connection with criminal investigations.

Q. And with a view to determining what about the exhibits that you examine?—A. Whether they are similar, the nature of the exhibits.

Q. Can you tell something, Mr. Higdon, about your experience and education in this respect?—A. Yes. I have a Bachelor
317 of Arts degree from the University of Tennessee and a Master of Science degree from Iowa State College, Ames, Iowa; and also some work on Ph. D. degree, about a third credit in the work for a Ph. D.

Q. I did not quite hear that last statement. You also have some work——A. Yes, sir; I have about a third off on my Ph. D. degree. About a third of the work completed.

Q. What are your major studies in connection with that?—A. Biological sciences principally, and also chemical and physical sciences.

Q. Have you also taught those sciences at various schools and colleges?—A. Yes, I have. I did research teaching at Iowa State College and also taught biological science and physical sciences at the Ferris School, which is a college located at Rome, Georgia.

Q. For how long a period of time have you been examining specimens for the FBI with a view to analysis of their content?—A. Approximately eighteen months.

Q. During that period of time you have examined a large number of objects, I presume?—A. Yes, I have.

Q. Mr. Higdon, I have a photograph here which is Exhibit 33-A, of a money belt. That money belt has a tag attached to it in the photograph stating "Money Belt of Ernest Peter Burger." Did you examine that money belt?—A. Yes, I did.

318 Q. There is also another exhibit here, Defendant's Exhibit A, "Money belt found in the apartment of Anthony Cramer." Will you look at that. Did you examine that money belt?—A. Yes, sir. I also examined this belt and compared it with the first belt; this belt here [indicating].

Q. In this examination that you conducted will you tell us what you did? What did the examination consist of?—A. Well, the

examination consists principally of a microscopical examination, that is, the analysis of the structure of the two belts.

Q. There is another exhibit here, Exhibit 35, which has been identified as a belt taken from E. J. Kerling. Did you examine that belt in the course of this study also?—A. I did.

Q. Had you completed telling us what you did in the course of this examination, Mr. Higdon? I do not know whether I interrupted you or not.—A. Well, I made a very detailed examination of the three belts, and compared the detailed information obtained and reached the conclusion that they are similar in construction.

Q. And in arriving at that conclusion that they were similar in construction, what things did you ascertain about all the belts?—

319 A. The first thing I examined was the type of fibres contained in the three belts. They all contained cotton fibers of very good grade. Secondly, I examined the actual material they are made of, not only the weave of the material microscopically, but also the individual threads that go to make up the material, and I found in each case that the three belts are made up of a two-ply thread. By two-ply thread, I mean two cotton yarns twisted together and it so happens in each case these threads are twisted in the clockwise direction. And I further examined the threads with which these belts were sewn and I found that the straps around the outside and between the compartments, the thread used in the bobbin is a three-ply left twist thread in each case, and each ply has two-ply threads, that is, made up of two-ply right twist thread, making a total of six plies, and that is used only in the bobbin of the machine that sewed these three belts. In the needle of the machine there was used a three-ply left twist thread and each ply made up of only one yarn and it is the same in each case.

Q. And am I correct, Mr. Higdon, that you are in effect stating that your conclusion was that all three belts are made of the same type of yarn and made on the same machine?—A. That is right.

Q. Now with respect to Defendant's Exhibit A, the belt found in Cramer's apartment, in your examination of that belt did

320 you discover anything that is not readily observable by the naked eye?—A. Well, I discovered the same thing that I discovered in the case of the other two belts. As I stated before, it is very close-woven material, hard finish, and this belt here [indicating] has the same type of black thread here at one place with another belt I examined, the one taken from Mr. Thiel.

Q. Does that cover everything you determined about these belts, Mr. Higdon?—A. I also did not mention the fact that the sewing is the same, got a double seam all the way around where the buckles are sewn on and the buckles have similar die markings and also

similar crimping tool markings on them—all three buckles—and also that this type of belt has four money compartments, and they are all similar in design and all three belts are possibly 35 inches in length each, and approximately 3 6 inches in width.

Mr. BURKE. You may inquire.

Mr. MEDINA. No questions.

JOHN D. McKINNEY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CORREA:

Mr. CORREA. May I have this marked for identification as the next exhibit?

(Marked "Government's Exhibit 73" for identification.)

321 Mr. CORREA. It consists of five pages.

Q. Mr. McKinney, you are a special agent of the F. B. I.?—A. I am, sir.

Q. And assigned to the New York office?—A. That is right, sir.

Q. I show you Government's Exhibit 73 for identification, consisting of five pages. Let me ask you, sir, were you present when those pages were written, as to four of them, and I think the last is hand printed.—A. I was, sir; two pages of handwriting——

Q. And two pages of hand printing?—A. Two pages of hand printing and two in writing in English and one in German.

Q. And by whom was the writing on those pages comprising that Exhibit 73 for identification, made, sir?—A. Werner Thiel.

Q. In your presence?—A. In my presence.

Mr. CORREA. If your Honor please, the exhibit is offered solely as a handwriting standard for another purpose.

Mr. MEDINA. If your Honor please, I do not think that than any question will arise here as to any paper that may be claimed to have been in Thiel's handwriting, and with which the defendant has had any connection. I really see no reason for ob-

322 jecting to this, and I merely offer now, as the defendant is fairly familiar with Thiel's handwriting, and has received many communications from him, that in case of any question the Government may merely have to submit the document to me and I will ask Mr. Cramer, and we will have no trouble about it, or no objection.

Mr. CORREA. That is all, Mr. McKinney. Any questions?

Mr. MEDINA. No; I have no questions.

(Government's Exhibit 73 for identification received in evidence.)

JOHN A. HOLTZMAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CORREA:

MR. CORREA. May this be marked as one exhibit for identification.

(Marked "Government's Exhibit 74" for identification.)

Q. Are you a special agent of the FBI, Mr. Holtzman?—A. I am, sir.

Q. Assigned to the New York office?—A. Presently assigned in Washington.

Q. Referring to June and July of this year?—A. June and July of this year I was assigned to the New York office; yes, sir.

Q. I show you Government's Exhibit 74 for identification, consisting of two pages with handwriting on them, the one in ink and the other in pencil, and ask you, sir, were those writings made in your presence?—A. Yes, sir; they were.

Q. And by whom?—A. They were made by Edward J. Kerling, on July 2, 1942.

MR. CORREA. Again, if your Honor please, the exhibit is offered, not for the content, but merely as a handwriting standard for use in connection with further testimony.

MR. MEDINA. I have no objection to the exhibit, but I cannot make the same offer as to this because Mr. Cramer is not familiar with Kerling's handwriting.

(Government's Exhibit 74 for identification received in evidence.)

MR. CORREA. I have no further questions of this witness.

MR. MEDINA. No questions.

CHARLES A. APPEL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CORREA:

Q. What is your occupation, Mr. Appel?—A. I am a special agent of the Federal Bureau of Investigation.

Q. And to what particular duties are you assigned?—A. I work in the laboratory of the Bureau at Washington, in the examination of questioned documents.

Q. For how long have you been so engaged, sir?—A. I have been a special agent for eighteen years.

Q. How long have you been engaged in the examination of questioned documents?—A. About eleven.

Q. And will you indicate to us briefly your qualifications by

way of training and experience in the field of examination of questioned documents?

Mr. MEDINA. I will concede that unless you desire to have it fully stated, that on the witness's statement I am perfectly willing to concede his qualifications as an expert.

Mr. CORREA. I think we will accept the concession.

325 Q. Mr. Appel, did you in the course of your duties for the Federal Bureau of Investigation have occasion to examine this object which has been marked Defendant's Exhibit A in evidence [handing witness], with a view to ascertaining whether or not there was any writing or writings thereon?—A. Yes; I did.

Q. And what conclusion did you reach, sir?—A. I found some faint marks at this place toward the end of the belt, and I tested them with an object of restoring the ink, which was very faint, and found the initials "w t" present.

Q. Written in ink?—A. Yes.

Q. Lettered or script?—A. Well, it is hand lettered.

Q. Hand lettering?—A. Yes.

Q. Did you make any photograph of that?—A. Yes.

Q. Have you any such photograph with you?—A. It is in the witness room.

Mr. CORREA. I wonder, your Honor, if the jury might wish to locate the place here. I think there is some faint mark perceivable there [handing exhibit to jury].

Q. Now, sir, I show you certain postcards which have been marked for identification Government's Exhibits 57 through 62 [handing to witness], each card being a separate exhibit for

326 identification, and I show you as well several sheets of handwriting and hand lettering which have been marked Government's Exhibit 73 in evidence as a handwriting standard [handing to witness], and I ask you, sir, did you make any examination of the handwriting on the postcards and a comparison of it with a view to ascertaining whether or not the postcards were written by the same hand that wrote Government's Exhibit 73 in evidence, the standard?—A. Yes; I did.

Q. Were you able to reach any conclusion as to all or any part of the postcards, or any part of the writing on them?—A. Yes; I came to the conclusion that the handwriting on Government's Exhibits 57, 58, 59, 60, 61, and 62, the postal cards addressed to Mr. Tony Cramer, were written by the writer of Government's Exhibit 73, Werner Thiel.

Q. Will you state what observations made by you led you to that conclusion?

Mr. MEDINA. We concede all that, Mr. Correa. There is no doubt that those postal cards are Thiel's.

Mr. CORREA. If it is conceded the cards are offered in evidence.

if your Honor please. Government's Exhibit 57 through 62 I offer in evidence.

Mr. MEDINA. I have no objection to these or any of them.

327 (Government's Exhibits 57 through 62 for identification now marked in evidence.)

Mr. CORREA. I neglected to mention, if your Honor please, that the cards are all written in German, and there are appended to the exhibits translations. I take it they may be received on the same arrangement as we have had heretofore with respect to other translations—that is subject to check by the defense.

Mr. MEDINA. That is satisfactory to the defense, your Honor, and if I may state as to all these translations, the Government has very kindly made them available to us and we have checked with Cramer, and he has told us that in each instance while the language is not exact the substance is there, and for that reason we are very glad to have the translations used.

Mr. CORREA. All right. [To jury:] Now, gentlemen of the jury, these post cards: Government's Exhibit 57 is a postcard addressed to Mr. Tony Cramer, 1235 Lexington Avenue, Box 83, New York City. It is dated in March of 1941 according to the post mark, and the translation reads [reads exhibit]. Government's Exhibit 58 in evidence is addressed to Mr. Tony Cramer, P. O. Box 173, Calumet City, Illinois, postmarked February 28, 1936, and reads: [Reads exhibit]. The translator has indicated in parentheses the name may be "D-r-o-d-g-e".

328 Mr. MEDINA. That is what it is as a matter of fact, "D-r-o-d-g-e."

Mr. CORREA. We do not know what it is. Government's Exhibit 59 in evidence is addressed to Mr. Tony Cramer, 1235 Lexington Avenue, Box 83, postmarked March of 1941, and reads in translation [reads exhibit]; Government's Exhibit 60 is addressed to Mr. Tony Cramer, 1235 Lexington Avenue, Box 83, New York City, postmarked March 31, 1941, and it reads in translation [Reads exhibit]; On Government's Exhibit 61 in evidence the date is not clear; it has what apparently is a Japanese postmark which bears the figure "837"; addressed to Mr. Tony Cramer, Box 83, 1235 Lexington Avenue, New York City, U. S. A. [Reads exhibit]; Government's Exhibit 62 is a post card postmarked Berlin, and dated as well in handwriting at the beginning of the writing, Berlin, October 8, 1941, and it reads as follows [Reads exhibit]: The address first: Mr. Tony Cramer, Box 86, 1235 Lexington Avenue, New York City.

By Mr. CORREA:

Q. I show you these exhibits marked for identification "Government's Exhibits 42 and 52" respectively, and you will note each

one of these exhibits bears in handwriting upon it the name William Thomas and an address [handing to witness]. Have you made an examination of that handwriting in which the
329 name William Thomas and the address on each exhibit are written?—A. Yes; I have.

Q. With a view to ascertaining whether or not it was written by the same hand that wrote the standard Government's Exhibit 73 in evidence which has been identified as being the handwriting of Werner Thiel?—A. Yes; that is right.

Q. What conclusion did you reach, sir?—A. I came to the conclusion that the handwriting on Government's Exhibits 42 "William Thomas, 50 W. 92d St., New York City" and the handwriting on Government's Exhibit 52 "William Thomas, Indland Steel 28 Mason, Hammond, Ind." was written by the writer of Government's Exhibit 73, Werner Thiel.

Mr. CORREA. I offer Government's Exhibits 42 for identification and 52 for identification in evidence.

Mr. MEDINA. No objection.

(Government's Exhibits 52 and 42 for identification now marked in evidence.)

Mr. CORREA (to jury): Gentlemen, Exhibit 42 in evidence is the registration card which has been identified here by an earlier witness from the Hotel Mayflower, and it bears the writing "William Thomas, 50 W. 92d St., New York City," which this witness has identified as being the handwriting of Werner Thiel. The card bears date of June 17, 1942. You recall the Hotel Mayflower is located in Jacksonville, Florida, from which the
330 witness testified earlier. The other exhibit, No. 52 in evidence, is a registration card of the Commodore Hotel, and again bears the name William Thomas, identified by the witness as being in the handwriting of Werner Thiel, and the address "Indland Steel, 28 Mason, Hammond, Ind." The card bears the time stamp June 21, 12.57 p. m., 1942.

By Mr. CORREA.

Q. Now, sir; I show you an exhibit which has heretofore been marked Government's Exhibit 53 for identification, and also an exhibit which has been marked in evidence as a handwriting standard of the handwriting of Edward John Kerling, Exhibit 74 in evidence [handing to witness], and ask you if you made any examination of those two exhibits heretofore with a view to ascertaining whether or not the writing appearing on any part of the writing contained thereon was made by the same hand?—A. Yes; I did.

Q. What conclusion did you reach respecting that, sir?—A. I came to the conclusion that the handwriting "Edward J. Kerling

Waltham Company, Clinton Street, Hammond, Inc." on the registration of the Commodore Hotel, which is Exhibit 53, was written by the writer of Exhibit 74, Kerling.

331 Q. I show you also another card bearing upon it certain handwriting, which is a part of Government's Exhibit 51 in evidence, and ask you if you made any examination of that writing appearing on the exhibit with a view to ascertaining whether or not it or any part of it was written by the same hand that wrote the handwriting standard of Edward John Kerling, Exhibit 74?—A. I did.

Q. What conclusion did you reach?—A. That the writing of the name, "Edward J. Kelly, 3314 Ninth Avenue, Astoria, N. Y.," was written by Edward J. Kerling.

Mr. CORREA. I will offer in evidence, if Your Honor please, Government's Exhibit 53 for identification, the other card identified by the witness as part of an exhibit already in evidence.

Mr. MEDINA. No objection.

(Government's Exhibit 53 for identification received in evidence.)

Mr. CORREA. Now, members of the jury, a part of Exhibit 51, which was identified by this witness as being in the handwriting of Kerling, is this registration card of the Hotel Seminole in Jacksonville, Florida. It reads [reading to jury].

The other exhibit, which is 53 in evidence, is the registration card of the Commodore Hotel, and reads [reading].

332 At this time, if Your Honor please, I should like to offer Government's Exhibit 49 for identification. According to our records it has not been offered in evidence heretofore.

Mr. MEDINA. That is one of those hotel records, isn't it?

Mr. CORREA. Yes. It is the registration card of the Mayflower Hotel in Jacksonville, and it simply shows how long Thiel remained there, from June 17th through June 18th, 1942.

Mr. MEDINA. No objection.

(Government's Exhibit 49 for identification received in evidence.)

Mr. CORREA. Members of the jury, I have stated that this simply shows that William Thomas remained there from the 17th of June through June 18, 1942, at the Mayflower Hotel, Jacksonville, Florida.

Q. Now, sir, I show you Government's exhibit which has heretofore been received in evidence and marked "67," and also Government's Exhibit 64 for identification, and 56 for identification; 64 for identification consisting in part of a post card with handwriting on it, and 56 for identification, being a piece of paper with handwriting on it. I will ask you if you made any examination of all three of those to ascertain whether or not they

333 were written by the same hand?—A. Yes; I did.

Q. And what conclusion did you reach?—A. I came to the conclusion that they were all written by the same person.

Mr. CORREA. Now, if Your Honor please, I will offer at this time Exhibit 64 for identification, which is a post card, and 56 for identification, which I may state bears on it an admission by the defendant Cramer that the writing on it, that is on 56, is his. However, it has not been offered heretofore. It is a reconstructed note found in his apartment; 64 for identification includes a translation, the text being in German.

Mr. MEDINA. As stated, Exhibit 56 bears upon it the identification——

Mr. CORREA. I think that was stated. I don't know that it needs to be stated again.

Mr. MEDINA. I withdraw that. As to Exhibit 64, we concede that that is in the handwriting of the defendant.

Mr. CORREA. It has been so identified by the witness, I believe.

Mr. MEDINA. Well, then, if counsel does not desire me to state that, I apologize.

Mr. CORREA. It does not make any difference, Judge.

Mr. MEDINA. I thought it would do no harm.

Mr. CORREA. No; I do not think it does.

334 (Government's Exhibits 56 and 64 for identification received in evidence.)

Mr. CORREA. Gentlemen, Government's Exhibit 56 in evidence is the reconstructed or pasted together note that was found in the apartment of the defendant Cramer according to the testimony of Mr. Carden. It reads [reading].

I think that exhibit was already read to the jury before, Judge.

Exhibit 64 in evidence is a post card which bears no stamp or postmark—apparently never sent—and it appears to have been written, or at least it has a Niagara Falls address. It bears no statement as to where it originated, but it reads, as translated, addressed to Mr. Werner Thiel, 17 Huyden Street, Dortmund, Westphalen, Germany, dated July 7, 1941. It reads [reading].

Mr. MEDINA. That was one of the postal cards found in Cramer's room, was it not?

Mr. CORREA. Yes. I think that is the testimony. Yes; that was one of the post cards found in his room.

I am corrected, if Your Honor please. As to Exhibit 56 for identification, what was read before was the duplicate, the note that was actually left. This is apparently a copy which was found in Cramer's room.

You may inquire.

335 Mr. MEDINA. No questions.

PAUL POWERS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. BURKE:

Q. Your name is Paul Powers?—A. That is right, sir.

Q. What is your occupation, sir?—A. Safe deposit manager.

Q. Safe deposit manager?—A. That is right.

Q. Of what bank?—A. Manufacturers Safe Deposit Company.

Q. Located where?—A. 85th Street and Third Avenue.

Q. Where do you live, Mr. Powers?—A. 2334 102nd Street, East Elmhurst.

Q. In the month of June of this year, Mr. Powers, did you have any connection with the effort on the part of the United States Treasury Department to get pledges from the public to buy war bonds and stamps?—A. I did, sir.

Q. What connection did you have with that?—A. Supervisor.

Q. Supervisor of what?—A. Of one square block.

Q. Of minute men?—A. That is right.

Q. That was voluntary, uncompensated work you were doing at that time?—A. That is right, sir.

Q. Do you recall, Mr. Powers, on June 22nd of this year in the course of your activities as a minute man, going to the house at 171 East 83rd Street?—A. That is right, sir.

Q. Did you go to the fifth floor of that house?—A. Right, sir.

Q. At about what time of day was this?—A. 6:30 in the evening.

Q. Will you tell us what occurred there?—A. I encountered——

Mr. MEDINA. I object to the form of that question, Your Honor, as much too broad.

The COURT. Yes; I think it is.

Q. Did you ring or knock at any of the doors on that floor, sir?—A. I did, sir.

Q. And how many?—A. All the floors and all the doors.

Q. Now will you look in the courtroom, sir, and tell us whether you see anyone here whom you saw on that floor that evening?—A. I do, sir.

Q. Point him out, please.—A. The gentleman over here, sir, the fourth man from my right.

Q. At which table?—A. At the counsel table.

Q. I mean there are two tables.—A. This gentleman right here [pointing].

Mr. MEDINA. He means Mr. Cramer, I think.

Mr. BURKE. Indicating the defendant Cramer.

Q. Now, did he come to the door of one of those apartments at which you inquired that night on that floor?—A. That is right.

Q. Did you have a conversation with him?—A. I did.

Q. Will you give us the conversation?—A. I told him I was representing the United States Government on a pledge drive, if he would care to sign a pledge for a bond. He was not interested. I asked him if he would sign up for a stamp. He said he was not interested.

Q. Anything further said by either of you?—A. No; and he closed the door.

Q. Directing your attention to what he said, did he say anything about a ten-cent stamp?—A. He said he was not even interested in the purchase of a ten-cent stamp.

Q. Then he closed the door?—A. That is right.

Q. Was there a bell at this apartment door, or did you knock?—A. I knocked.

Q. Now after he closed the door did you knock again?—A. I did.

Q. What occurred?—A. Knowing there was other roomers in there, I thought I could get to them. He opened the door again and closed the door.

Mr. BURKE. That is all.

338 Mr. MEDINA. No questions. I move to strike out the entire testimony of this witness as irrelevant and of no probative force whatever on any of the issues in the case.

The COURT. I think I will let it stand, Mr. Medina.

Mr. MEDINA. I respectfully except.

EMMA KOPP, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. CURRAN:

Q. Now, Miss Kopp will you try to keep your voice up so that the last juror here can hear you?—A. Yes, sir.

Q. Your name is Emma Kopp?—A. Yes, sir.

Q. And are you also known as Norma Kopp?—A. Yes, sir.

Q. Where were you born?—A. In Frankfort-on-Main, Germany.

Q. When did you come to the United States, Miss Kopp?—A. On the 17th of August 1928.

Q. Have you gone back to Germany since August 17, 1928?—A. Yes, sir; I did.

Q. When?—A. On the 18th of May 1933.

Q. And was that just a visit?—A. A visit.

Q. How long did you stay?—A. Until the 15th of Octo-
339 ber 1933.

Q. And you returned to this country?—A. Yes, sir.

Q. Do you know the defendant in this case, Anthony Cramer?—A. I know him, yes.

Q. When did you meet him?—A. I think it was in May or June 1937.

Q. Do you know or did you know as well a man by the name of Werner Thiel?—A. Yes, sir.

Q. And when did you meet him?—A. The end of June 1937.

Q. How did you meet Thiel? Was he introduced to you by someone?—A. Yes, sir.

Q. By whom?—A. By Anthony Cramer.

Q. Did you remain a friend of both Cramer and Thiel?—A. Yes, sir.

Q. And you saw both of them from time to time after 1937?—A. Yes, sir.

Q. And did there come a time when Thiel went away?—A. Yes, sir.

Q. When was that?—A. I beg your pardon?

Q. When?—A. When Thiel went away?

Q. Yes.—A. In 1941, in—I cannot think.

Q. What part of the year?—A. In March, 27th of the March 1941.

Q. And was there any discussion had between you and Thiel in the presence of Cramer as to where Thiel was going in March of 1941?—A. He went to Germany.

Q. Was that discussed between you and him in Cramer's presence at any time during that month, for example?—A. Well, yes; he did go back. We discussed that.

Q. Now, ma'am, directing your attention to June of this year, did there come a time in June of this year when you received a communication from the defendant Cramer?—A. Yes, sir.

Q. And where were you in June of this year?—A. In Westport, Connecticut.

Q. You were working up there, were you not?—A. Yes; worked there; yes; in a private family.

Q. Were you a nurse?—A. No; I was a laundress and a kitchen maid.

Mr. CORREA. May this exhibit, consisting of an envelope and note of page of handwriting and a translation be marked as the Government's next exhibit for identification?

(Marked "Government's Exhibit 75" for identification.)

Q. Now, you said you had a communication from Mr. Cramer. In what form was it? A. He told me had a log.

Q. No; in what form was the communication?—Was it a telephone call?—A. It was a letter, written in June.

Q. I show you Government's Exhibit 75 for identification, which consists of an envelope and letter in part [handing to witness] and ask you is that the letter you received?—A. Yes, sir.

Q. Have you seen Cramer write? Have you seen him write at any time?—A. After this letter; yes.

Q. Do you know his handwriting?—A. Yes, sir.

Q. And you had correspondence with him before?—A. Yes, sir.

Q. And is this in the handwriting of Cramer?—A. Yes, sir.

Mr. CORREA. I will offer the exhibit in evidence, if Your Honor please.

Mr. MEDINA. No objection.

Mr. CORREA. And the translation.

Mr. MEDINA. And the offer includes the admission by Cramer that it is his handwriting, I take it.

Mr. CORREA. Yes; I understand that that is already referred to in Willis's examination.

342 Mr. MEDINA. No objection.

(Government's Exhibit 75 for identification now marked in evidence.)

Mr. CORREA (to jury). Members of the jury, Government's Exhibit 75 in evidence, which is the note the witness stated she received from Cramer, reads in translation as follows—I may say it is postmarked June 25, 1942, addressed "Miss Norma Koppe c/o Mrs. H. C. Tate, Westport, Conn."

Q. That is the place where you worked, is it not?—A. Yes, sir.

Mr. CORREA. It has the return address 304 East 87th Street, New York, and it reads [reads exhibit].

Each of the original exhibits bore the identification written by Cramer in August, of the handwriting, as being in German.

By Mr. CORREA:

Q. Did you come to New York after you received that note?—A. Yes, sir; I did.

Q. When did you come to New York? After you received that note?—A. On the 26th of June, 6 o'clock.

Q. When you came to New York where did you go?—A. I did go to 165 East 88th Street.

Q. To what place there?—A. To the German Catholic Society Club.

343 Q. Was that the Kolping House?—A. Yes, sir.

Q. How long did you remain there?—A. Until 8 o'clock.

Q. Did you see the defendant Cramer there?—A. No, sir.

Q. Did you see him later that evening?—A. Yes, sir.

Q. When?—A. About 20 minutes past 9.

Q. Where?—A. In his room.

Q. At what address?—A. 171 East 83rd Street.

Q. When you arrived at that address he was there, was he?—A. Yes, sir.

Q. Will you tell us just as closely as you are able to recall what conversation took place?—A. Yes.

Q. Mentioning what he said to you and what you said to him.—A. He asked me if I received his letter. I said yes. He asked me what I thought of the news he has to tell me. I told him I could not make out. He asked me again. I said, "Tony, I don't know what it could be." He asked me again I should think hard. I said, "I haven't got the slightest idea what it could be." Then he told me that he received a note one night underneath his door when he came home, and on that note it said "Franz is here from Chicago," and he asked me again "Who do you think that Franz is?" And I told him, "Tony, I don't know, we have so many friends in Chicago I don't know who it could be." Then he said when is he here—he came two times, the note said he should be down on 42nd Street and Grand Central to meet Franz, and when he got there he met Werner.

Q. Referring to whom?—A. Werner Thiel. And I asked him "Werner?" He said yes. I said "It can't be." He said "Yes, it is Werner." I said, "My God, Tony, why did you tell me that?" And I asked him again "Are you fooling me?" And he said no. I asked him "What is he doing here, how did he come?" He said, "Eddie is with him, he is not alone; they came about six men with a U boat, in a rubber boat, and landed in Florida." And I asked him again, "Is this really so?" So he said "Yes; Tony is here—Werner is here, and they live in the Hotel Commodore." Then I asked him "What is he doing here, what is he living on?" He said, "Oh, they brought so much money along from Germany, from the German government." And I asked him "Did you see Werner?" He said yes, he met him in the Thompson's restaurant on 42nd Street, and he asked Thiel to give him the money, he will save it for him in a safety-deposit box.

Mr. MEDINA. Is this all the conversation of the evening, the first evening, that she met him in his room?

Mr. CORREA. The question is, if Your Honor please, as to the conversation on the occasion of her meeting, and I take it that is what the answer is.

Q. You say "he" asked Thiel.—A. Yes, sir.

Q. To whom does "he" refer?—A. Cramer asked Thiel to let him have the money; he will rent a safety-deposit box and keep it for him.

Q. That is what Cramer told you?—A. Yes, sir.

Q. All right; proceed if you will, please.—A. Then he told me—I asked him again, "What are he doing here?" He said, "They got instructions from the sitz in the Bronx what to do, and where to go," and I asked Cramer——

Q. Excuse me just a moment, Ma'am. You say Cramer told you that they were to get instructions from the sitz in the Bronx.—A. Yes. That means a hideout.

Q. S-i-t-z, that is a German word you used?—A. Yes.

The COURT. That means what?

The WITNESS. A hideout. And I asked Cramer, "What do you mean by sitz?" And he told me he didn't know exactly himself. And then he told me he is expecting Thiel that same evening until 10 o'clock; if he does not come by 10 he probably will be in Long Island with Kerling; he has friends in Long Island, to visit them.

Q. Just to be sure we understand, Cramer told you that he was expecting Thiel at Cramer's apartment that evening?—A. Yes, sir; by 10 o'clock.

Q. Until 10 o'clock?—A. Yes, sir.

Q. That is, he would be waiting until 10 o'clock?—

346 A. Yes, sir.

Q. All right, is that the entire conversation?—A. Then he went to the bathroom for a few minutes, and he came back. He said he is going to make a cup of coffee—it is 10 o'clock, he won't come any more. And I told him I would rather go to the Kolping House for a glass of beer.

Q. Was that the end of the conversation?—A. Yes, sir. That is the end of the conversation.

Q. Is that all you recall about that conversation?—A. Yes, sir.

Q. Let me ask you, you stated that in the course of this conversation Cramer told you that Thiel and Kerling had a lot of money from the German government, did you not?—A. I did say.

Q. Did he mention any amount which they had or either of them had?—A. Oh, yes; 3,000, three and a half thousand, something like it, he took.

Q. "Three and a half thousand," he said?—A. Yes.

Q. After this conversation where did you go?—A. We did go to the Kolping House, 165 East 88th Street.

Q. You and Cramer?—A. Cramer and me; yes.

Q. And on your way to the Kolping House or at the Kolping House, in other words during the remainder of the evening, did you have any further conversation with Cramer

347 concerning Thiel or Kerling?—A. He told me on the way to the Kolping House that he will go to the Hotel Commodore the next evening around 11 o'clock and leave him a note that he will come to meet him.

Q. Leave "him," referring to whom?—A. To meet Thiel.

Q. When you say he would leave "him" a note, leave Thiel a note?—A. He told me that he will leave a note for Thiel at the Hotel Commodore.

Q. Did you have any other conversation about Thiel or Kerling?—A. After this Cramer asks me to come along—to come to his room next day at 4 o'clock, half past three. Oh, excuse me.

I think it was 3 o'clock; I am not quite sure any more. And I should come along to Thompson's restaurant to meet Thiel.

Q. On the following day did you go to Cramer's apartment?—A. Yes, sir; 20 minutes to 4 the next day.

Q. Was he there?—A. Yes, sir.

Q. Tell us what you did.—A. Pardon?

Q. Tell us what you did, please.—A. Then we did go together to Thompson's restaurant.

Q. That is you and Cramer?—A. Yes, sir.

Q. How did you come down, on the subway?—A. On the subway; yes, sir.

Q. Did you go into the restaurant?—A. Yes, sir.

Q. How long did you remain in the restaurant?—
348 A. Until half past four.

Q. Then where did you go after that?—A. Then we did go home.

Q. When you say you went home——A. We parted on Lexington Avenue and 88th Street.

Q. About what time?—A. When we came back from Thompson's restaurant. It was about 20 minutes to 5.

Q. Did you see Cramer again that evening?—A. Yes, sir; in the Kolping House.

Q. About what time?—A. About 10 o'clock.

Q. Did you see him leave the Kolping House that evening?—A. Yes, sir.

Q. With whom?—A. Shortly before 11.

Q. With whom?—A. With the FBI agents.

Q. Did you know they were FBI agents at that time?—A. Everybody said so.

Q. By the way, had you had any conversation with Cramer in the course of these two meetings about a minuteman?—A. Oh yes.

Q. When did you have that conversation?—A. In his room also.

Q. On which occasion?—A. On that Friday night.

Mr. MEDINA. I object to this unless the witness is clearly asked to state any conversation she had, without leading.

349 Mr. CORREA. Now, if Your Honor please, that last statement of counsel is uncalled for and unwarranted. I have not been leading this witness and counsel knows it. I don't know why he makes such a statement.

Mr. MEDINA. You cannot get into a quarrel with me.

Mr. CORREA. I do not desire to.

The COURT. I do not think the question was leading.

Mr. CORREA. Did Your Honor rule the question was leading?

The COURT. I said I don't think it was. Nor do I think you have to lead.

Q. Will you tell us what Cramer said to you on that subject?

Mr. MEDINA. If the question relates to the subject of the minuteman, I object to it as irrelevant and of no probative force in the case.

Mr. CORREA. If Your Honor please, in support of the relevancy and materiality of that proof, it is the position of the Government that showing the general motive and disposition, insofar as loyalty to this country is concerned, of this defendant, is probative on the issue of intent. We do not of course say that it is any substitute for specific intent; we have shown specific intent.

350 But this we contend is probative on the issue of intent.

We have shown his motive by writings in November and December 1941.

Mr. MEDINA. Well, I object to this, Your Honor.

Mr. CORREA. May I state my position? Do you want me to state it frankly?

Mr. MEDINA. I do want you to state it frankly, but not with undue elaboration.

Mr. CORREA. We have shown what his motive was, or rather what his disposition was, in November and December of 1941. We have brought it up to date, to April 1942. Now here is another incident which is indicative of his general sympathies and loyalty, occurring, as it happens, on June 22, 1942, the very date of his first meeting with Thiel. I think that is relevant and admissible, and that the objection, if any, goes only to the question of the weight, which is a question for the jury to consider in the light of all the evidence.

Mr. MEDINA. If Your Honor please, I think Mr. Correa's statement only emphasizes the legal effect of my objection. As I understand the crime of treason, the intent involved is a purely specific intent, not a general one. That, as I said, emphasizes one phase of the point of my objection. I think it is particularly harmful because its effect may well be much more than any

351 slight probative value it may possibly have, and we claim it has none.

The COURT. I think incidents of that sort might corroborate, or the jury might find, if corroborated, certain other testimony offered by the Government indicated motive or intent of the defendant.

Mr. MEDINA. I respectfully except.

(The last question was read as follows: "Q. Will you tell us what Cramer said to you on that subject?")

Mr. CORREA. That is on the subject of the minuteman.

A. He also told me that the minuteman called at his door a few days before I saw him, on the 26th, and he got kind of fresh and he closed the door at him.

Q. Is that all he said to you on that topic, Ma'am?—A. That is all I remember.

Mr. Medina. I move to strike out the answer upon the same ground as I objected to the question, your Honor, so as to complete my record.

The Court. Motion denied.

Mr. Medina. Exception.

Mr. Correa. You may inquire.

Cross-examination by Mr. Medina:

Q. I notice you have referred in your answers to the defendant as "Cramer." Didn't you call him "Tony"?—A. I did;

351 A. yes, sir.

Q. He was not known to you as Cramer, he was Tony to you, wasn't he?—A. Tony Cramer.

Q. But I say when you addressed him and referred to him with people who were mutual acquaintances, you referred to him as Tony, did you not?—A. Yes, sir.

352 Q. I think you said you had known him since May or June, 1937?—A. Yes, sir.

Q. In the interval after that you saw a good deal of Tony, didn't you?—A. Yes, sir.

Q. Off and on?—A. Yes, sir.

Q. Did he ever wrong you in any way?—A. No, sir. He always had been a gentleman to me.

Q. Were your dealings with him always pleasant?—A. I do not——

Q. You have no reason to harm him in any way, have you?—A. (No answer.)

Q. Or have you?—A. (No answer.)

Q. Why are you silent?—A. I have no reason to harm him.

Q. None that you can recall, is there?—A. (No answer.)

Q. Now when you had this conversation that you have testified to here, in the evening when you came in from Westport, what did you think he was here for?—A. I did not believe him.

Q. I say, what did you think he was here for?—A. I did not think anything. I could not believe it.

Q. That lets you out, does it?

Mr. Correa. I object, if your Honor please, to that question.

353 The Court. I think that objection should be sustained.

Q. Now I ask you again, look at these gentlemen, and

tell them what you thought Thiel was here for. You knew he was here, didn't you?—A. I did not believe.

Q. Did not even believe he was here?—A. I did not believe it. I asked him over and over, is it really so. I thought he was fooling me.

Q. You did not even believe that Thiel was here?—A. No, sir; that is why I went along to the Thompson's restaurant Saturday afternoon to convince myself.

Q. But you honestly did not think he was here at all?—A. I did not think that he was here.

Q. And so you did not reach the point where you began to think what he was here for, did you?—A. I did not.

Q. Now you realize you are under oath here; don't you?

Mr. CORREA. That is objected to, if your Honor please, and I think uncalled for in the light of the examination up to this date; stating to the witness "You realize you are under oath." Of course the witness realizes she is under oath.

The COURT. Do you want to press that question?

Mr. MEDINA. Why yes, your Honor. I think it is entirely proper.

The COURT. All right.

354 Q. You realize you are under oath here, don't you?—A. Yes; I realize it.

Q. Now do you say again seriously to this jury here that you did not have any thoughts at all as to why Thiel was here?—A. I didn't think.

Q. But I did not ask you whether you believed it. I asked you whether you had any thoughts of why he was here.

The COURT. Don't you think the witness has answered that several times; that she did not think about it because she did not believe he was here?

Mr. MEDINA. Well, I don't think I need accept that as so, your Honor.

The COURT. All right.

Q. What is your final word on that as to what you thought he was here for, if he was here?—A. I did not think so far.

Q. Did you think that there was a possibility that what Tony told you was so; namely, that Thiel was here?—A. I did not believe it.

Q. No; I know you have said that many times, but I ask you didn't you realize that there was a possibility——A. No.

Q. (Continuing.) That he was here?—A. No.

Q. You won't admit that even there was a possibility

355 of it?

Mr. CORREA. I object, if your Honor please, to the form of the question; even there was a possibility of it.

The COURT. Sustained.

Mr. MEDINA. Exception.

Q. Now you were taken into custody shortly after Tony was, weren't you?—A. Yes, sir.

Q. And did they take you down to the FBI room in this building?—A. Yes, sir.

Q. I don't suppose you were taken down together with Tony?—A. No, sir.

Q. You went separately?—A. Yes, sir.

Q. Were not you a little bit frightened?—A. I was nervous.

Q. But you were not frightened?—A. No, sir.

Q. You knew you had not done anything wrong, didn't you?—A. That is right.

Q. You did not believe anything, so naturally you had not done anything wrong?—A. That is right.

Q. And you felt entirely calm and collected, did you?—A. That is right.

Q. Not in the slightest degree frightened, right?—A. That is right.

Q. Now did you reach a time after you got down here
356 that you were questioned?—A. I beg your pardon?

Q. I say, after you got down to the building here, did there come a time when some of these FBI men started to question you?—A. Yes, sir.

Q. I address your attention to the time they questioned you first and I ask you what you told them?—A. I told them that I received a letter from Cramer on the 26th of June, and in the evening, six o'clock, I came to New York and then to the Kolping House, 88th Street, until eight o'clock, and I did shopping until twenty minutes past nine, and I went up to Cramer's apartment.

Q. You always seem to call him Cramer now. Did you stop calling him Tony since he got into trouble?—A. No, sir.

Q. Well, just be natural about it, if I may suggest that. Now go ahead and tell us what you told these people.—A. (No answer.)

Q. I am not so much interested in which side of the street you walked in and that sort of thing, but what you told them when they first questioned you about what Tony told you about Werner. What did you tell them when they first questioned you?—A. I don't remember.

Q. Did you at that time deny to the FBI men that Tony told you anything about Werner?—A. No, sir; I did
357 not deny anything.

Q. I did not ask you whether you denied anything. I asked you whether, when you were first questioned, you told the FBI men that Tony had told you nothing about Werner. Is that the fact, that you told them that?—A. I did tell the truth.

Mr. MEDINA. I move to strike out the answer as not responsive.

The COURT. Yes.

Mr. MEDINA. The reporter will kindly read the question.

Q. (Question read.)

The COURT. Do you understand that question?

The WITNESS. No, sir.

The COURT. I don't think the witness understands.

Mr. MEDINA. Then I will reframe it, your Honor.

Q. You understand, Miss Kopp, that when you were first questioned by the FBI men, you could either say "Yes, Tony told me certain things about Werner," or you could say "Tony told me nothing about Werner whatever." Now, did you do that?

The COURT. I don't think that question is very clear to this witness.

Mr. MEDINA. Perhaps it is about as clear as it can be made
358 the way I put it the first time, and I ask that it be read again.

The COURT. Listen carefully, and if you do not understand, just say that.

(Question read as follows:

"Q. I asked you whether, when you were first questioned, you told the FBI men that Tony had told you nothing about Werner. Is that the fact, that you told them that?")

A. I did tell the FBI men what told had said to me.

Q. And you told them that right in the beginning; didn't wait a minute?—A. Yes, sir.

Q. And what you told them at that time was set forth in a writing, wasn't it?—A. I beg your pardon. I don't understand.

Q. You know what it is to write on a paper with a pen or pencil, do you, Miss Kopp?—A. Yes.

Q. Now when you made this statement when you were first questioned that Saturday evening down here in this building, did not some one of those FBI men have it written right out for you to sign?—A. I don't remember that I signed anything.

Q. You don't remember signing anything?—A. Not that first night.

Q. Were you questioned for a long time that first night?—A. I did not look at the clock, how late it was.

359 Q. Do you know that Tony, if he is convicted here—is go to his death?

Mr. CORREA. That is objected to, if your Honor please. I think that is an extremely improper question.

The COURT. Objection sustained.

Mr. CORREA. I ask that counsel be admonished.

The COURT. Yes. I think that was a little bit out of order.

Mr. MEDINA. If your Honor please, I most respectfully except

to your Honor's ruling. I think I am entitled to bring that to the witness's attention particularly when such a flippant comment is made as was just made in response to my question.

Mr. CORREA. I object and move to strike counsel's characterization of the witness's answer as being uncalled for, and also unwarranted and flippant.

The COURT. I think it was uncalled for. I am not convinced that she was trying to be flippant at all.

Q. You say you did not have a clock on the time you were there. You said that, didn't you?—A. I did not look at the clock.

Q. Did you think that I said you did? Did you?—A. Pardon?

Q. Did you think that I stated that you did look at a clock?—A. (No answer.)

Mr. CORREA. I will object to this. I don't think counsel should try to take advantage of the witness's obvious difficulties with the language in this manner. I think that kind of question is improper.

Q. Is the question answered?—A. (No answer.)

Q. Did you think that I made any reference to a clock, Miss Kopp?

The COURT. Do you know what "reference" means?

The WITNESS. No, your Honor.

Q. Now I ask you again, and you know about the lapse of time as well as other people, how long do you think you were questioned by the FBI men on that Saturday evening when you were down in this building here being questioned?—A. I cannot remember how late it was.

Q. Can you form an estimate? You seem to have a pretty good memory of other things.

The COURT. I ask you now how long? Not what time it was.

The WITNESS. I don't remember.

Q. Can you form an estimate?—A. (No answer.)

Q. Is there something you are afraid of here?—A. No, sir.

Q. You have no reason to fear anything, have you?—A. No, sir.

Q. I ask you again, what is your best recollection as to the length of time you were questioned by the FBI men on that Saturday evening?—A. I came into this building late in the afternoon. I do not think I had been questioned any longer than two hours.

Q. But I thought you told them right off the bat the same thing you have told the Jury here. Did you?—A. I beg your pardon?

Q. Don't you understand that question?—A. No, sir.

Q. I say, I thought you told this jury a little while ago that

when they first questioned you, you at once told the FBI men just what you told the jury here today. Didn't you?—A. I don't know if I told them the first evening really.

Q. Not so sure about that now?—A. I am not sure.

Q. This story that you told here today took you a little time to think over before you told that to anybody, didn't it?

Mr. COHEN. That is objected to, if our Honor please. I don't think counsel should characterize the witness's testimony in that fashion.

The COURT. That objection is sustained.

Mr. MEDINA. Exception, your Honor.

Q. Do you state now to this jury that when you were first questioned by the FBI men, you told them a different story
362 than the story you told here today? A. It is the same story.

Q. The same story? So that for the minute am I to understand you to say that you did not tell them right away, or did I misunderstand you?—A. I don't remember any more.

Q. But you do remember that you were questioned about two hours, as far as you can recall, on that Saturday evening? A. It has been on a Tuesday night.

Q. Oh, it was a Tuesday night that the FBI men took you into custody, was it? A. Yes, sir.

Q. How do you happen to remember that? A. Pardon?

Q. How do you happen to recall that it was a Tuesday night? A. I do remember that.

Q. You have some independent recollection of that, have you?—A. (To the Court.) May I have an interpreter, please?

The COURT. Do you know what "independent" means?

The WITNESS. Yes, sir.

Mr. MEDINA. I don't think we need an interpreter. I vehemently object to it.

The COURT. I don't think we do as yet, certainly.

Q. Now, how do you fix that as a Tuesday night?

Mr. COHEN. I suggest if counsel does not want an interpreter that he is using the biggest words he can think of.

363 Mr. MEDINA. I do not think they are the biggest I can think of.

Q. Now, Miss Koppe, will you resume, and I ask you, how you happen to fix that as a Tuesday night that you were taken into custody and questioned by the FBI men?—A. I had been in Greenwich, Connecticut, and on a Sunday night I had been told to move out, and I moved out on a Monday night, and on Tuesday morning the FBI agent called for me.

Q. Do you recall that you said something about the Kelly House?—A. Yes, sir.

Q. And how you and Tony were up there in the Kolping House, and Tony was arrested?—A. Beg your pardon?

Q. I say, do you remember that you testified that you were up at the Kolping House with Tony, and that Tony was arrested there?—A. Yes, sir.

Q. And don't you remember Mr. Correa asked you something about whether you knew that they were FBI men, and you said you did, or everybody around said they were. Do you remember that?—A. Yes, sir.

Q. Now you were arrested that same night, weren't you?—A. No, sir.

Q. Then we have been talking a little bit at cross purposes, because I thought you said that you were. Now it is a fact
361 that when they arrested Tony that night you were allowed—or you were not arrested?—A. No, sir.

Q. And you realized, however, that Tony had been arrested, didn't you?—A. I thought it was the minute men.

Q. Well, anyway, you were not arrested at the same time Tony was arrested, were you?—A. No, sir.

Q. And so you left the Kolping House that night and you went back to Greenwich?—A. No, sir. I went back to Greenwich Monday night. I worked in Westport. I beg your pardon.

Q. I ought to beg your pardon because I introduced that word "Greenwich" and I should not have. I meant Westport. You went back to Westport?—A. Monday morning, seven o'clock.

Q. And isn't it a fact that in that interval between the time Tony was arrested and the time you went back to Westport the next morning, that you felt no particular concern about Tony? You were not worried about him?—A. I thought it was on account of the minute-men. He had told me he had the [illegible] minute men out.

Q. And I say because you thought it was just on account of these minute men and this incident, it did not worry you particularly?—A. No, not particularly.

Q. You did not have any idea that he was in anything serious, did you?—A. No, sir.

Q. And so when you went back to Westport you gave
362 that comparatively little thought. You did not worry about that at all, right?—A. I did next the next day, Sunday, about the eight saboteurs and then I believed that Thiel was here. I saw his picture in the paper.

Q. It was that very Sunday that you read in the news-paper about the eight saboteurs, was it?—A. Yes, sir.

Q. And I notice you have been very particular in giving times, of stating the exact hour of the day and the exact dates. Do you generally do that?—A. As much as I can remember.

Q. You have a pretty good exact memory, havent you?—A. I don't know.

Q. But you seem to emphasize the details when somebody asks you and you say exactly the hour of the day and the place and the date. That is your habit, is it?—A. It is not a habit. If it is necessary.

Q. You feel it is necessary here, do you?—Or is that word too big?—A. Yes, it is necessary.

Q. And that is why you do it here, although not ordinarily, is that what you mean to say?—A. I sometimes do and sometimes not: if I remember.

Q. So that sometimes you are quite precise and exact and sometimes you are not, all dependent on the circumstances, is that right?—A. Yes, sir.

Q. Now you say that it was on the Sunday after Tony
366 was arrested that you noticed about the saboteurs in the newspapers?—A. Yes, sir.

Q. Do you remember what newspaper it was you read it in?—A. It was—I did not read the paper. I just saw the pictures and the headlines. It was the Times.

Q. In the New York Times?—A. Yes.

Q. And you saw the pictures of these men?—A. Yes, sir.

Q. And that is the day after Tony was arrested?—A. On the 28th of June.

Q. 28th of June, 1942?—A. Yes, sir.

Q. Do you remember what time of the day you read that newspaper?—A. I say it was about five o'clock in the afternoon.

Q. Five o'clock in the afternoon, and where were you sitting?—A. I went to friends on 1575 Third Avenue.

Q. And you remember who was sitting around as you looked at that picture?—A. They went out and bought the paper and everybody looked at the paper.

Q. Do you remember who was there?—A. Not exactly. I know two men.

Q. And who were those two men?—A. One was the owner, Bernard Hillman——

Q. And who was the other one?—A. Carl Nauman. He is the tailor.

Q. And when you say Carl, you call it Paul?—A. That
367 is right.

Q. You got pretty well scared when you saw the newspaper and saw their pictures in there, didn't you?—A. I did not get scared.

Q. You did not connect that at all with anything Tony had told you?—A. Then I began to realize why Tony was arrested.

Q. But I am saying, did you connect that picture with anything

that Tony had told you?—A. I beg your pardon. I don't understand.

Q. When you saw that picture, was there some connection that seemed to you to exist between that picture and anything that Tony had told you?—A. Tony had told me that he met Thiel.

Q. But I say, did you think, after you saw that picture, that there was some connection, some relation, between that picture and what Tony had told you?—A. I did realize then; yes, sir.

Q. Now when you realized that, you still want these gentlemen of the jury to believe that you did not get frightened?—A. I did not get frightened.

Q. You did not get frightened at all?—A. No, sir.

Q. Didn't you think that this was a pretty serious matter that you were perhaps getting involved in?—A. I have not seen Werner Thiel.

368 Q. Well, I know, but I am asking you whether, when you saw the picture in the newspaper of this man—and by the way, how many did you say there were that were in the picture?—A. Eight.

Q. And Werner was one of the eight, wasn't he?—A. Yes, sir.

Q. There was his picture staring at you right out of the newspaper, wasn't it?—A. Yes, sir.

Q. You knew him pretty well, didn't you?—A. Yes, sir.

Q. When you saw that picture in the newspaper on that Sunday, you remembered what Tony had told you, and didn't it occur to you that you might get into some trouble?—A. I were not frightened.

Q. Well, I repeat my question. Didn't it occur to you that you might get into some trouble?—A. No, sir.

Q. The thought never came into your mind that you would like to keep out of trouble, did it?—A. Yes, I did think so.

Q. You thought of that all right. Now did it occur to you what would be the best way for you, Norma Kopp, to keep out of trouble?—A. I thought the best way if I be questioned, is to tell the truth.

Q. You thought of that right there on that Sunday when you looked at that picture?—A. I never thought of that on that Sunday.

369 Q. That is the day I am asking you about. When you looked at that picture in the paper and thought of what Tony had told you, and you were not a bit scared, I say didn't it occur to you then that you had better think of what you had better do to keep out of trouble yourself?—A. A friend of mine told me that if I——

Q. No, I am not asking about what a friend of yours told you.

I am asking you whether, when you saw that picture, and your mind got working, that you did not think you had better do what would keep you, Norma Kopp, out of trouble?—A. (No answer.)

Q. Now did that occur to you?—A. I thought if I will be questioned I will tell the truth.

Q. But you said a little while ago that that is what you thought up later. I am asking you what you thought about at the time you looked at this picture and were considering what Tony had told you?—A. I didn't think. I was nervous.

Q. You were nervous then and you did not think of yourself?—A. No; I didn't think of myself.

Q. Now did it occur to you when you saw that picture in the newspaper on that Sunday, that you had better run to the nearest telephone and call up the district attorney?—A. I thought it was not necessary. Both had been arrested.

Q. You did not think that anything that you knew
370 about the matter made any difference, did you?—A. I don't——

Q. I say you didn't think what you knew about the matter was of any importance to anybody?—A. That is right. I didn't think so.

Q. And that is the reason why you did not go to the telephone to call up the authorities?—A. That is right.

Q. I thought you explained what Tony had told you was about these various dealings that he had had with this man. Didn't you say something like that?—A. When the FBI agents called for me, I did tell them.

Q. But we will come to that later. I am talking about this Sunday when you were looking at that paper there and you did not go and do any telephoning. Do you understand that?—A. Yes.

Q. Now I say again, with the knowledge of what you say Tony told you, didn't you think that it was important that either the police or the district attorney or the FBI should be told about that?—A. I didn't think.

Q. You didn't think about it. Did you in any manner, by telephone or by writing or by going personally, convey that information on that Sunday to any of the public authorities?—A. I beg your pardon?

Q. Did you on that Sunday when you saw this newspaper communicate, that is, get in touch, by telephone or any other
371 way, with the police or with the district attorney or with the FBI?—A. I didn't think to get in touch with anybody.

Q. But I am asking you not whether you thought to do it, but whether you did it?—A. I didn't.

Q. Do you recall whether on the evening that Tony was arrested any men from the FBI asked your name?—A. No, sir.

Q. You saw the men when they actually took Tony away, didn't you?—A. I saw one man.

Q. Let us take it as one man. You saw that one man, didn't you?—A. From the back.

Q. From the what?—A. From the back.

Q. But you don't want to take back anything you said about knowing that the man was an FBI man, do you?—A. (No answer.)

Q. Don't you remember you told these gentlemen when Mr. Correa was asking you, that you knew that the man or men was an FBI man?—A. I just knew it through the others.

Q. But however you knew it, the fact remains that you did know it, didn't you?—A. (No answer.)

Q. All right. You are in doubt about that now?—A. Yes. I knew it was the FBI.

Q. Now when that FBI man took Tony into custody, did the FBI man speak to you at all?—A. No, sir.

372 Q. Did you have any reason to know that the FBI man knew who you were?—A. No, sir.

Q. So that when that FBI man took Tony Cramer out of that Kolping House, for all you knew the FBI man had absolutely no knowledge of who Norma Kopp was, isn't that so?—A. I didn't know.

Q. But as far as you can tell, he did not know anything about you?—A. That is right.

Q. Now there you were, on that Sunday, the very next day, looking at that paper and seeing these pictures of these saboteurs. Didn't you think it was up to you to communicate with the public authorities and tell them what you knew?—A. I didn't think.

Q. You didn't think of it. Was that because you wanted to keep Norma Kopp out of this?—A. No, sir.

Q. You didn't feel there was anything for you to fear, did you?—A. I knew both were arrested.

Q. But I say, you did not think of yourself, how to keep Norma Kopp out of trouble, did you?—A. No, sir.

Q. You did not refrain, you did not omit to communicate with the police in order to keep yourself out of the mess, did you?—A. No, sir.

373 Q. That never entered your mind, did it?—A. No, sir.

Q. Now you say that the next day, Monday, you went back to Westport?—A. Yes, sir.

Q. And it was on the following day, Tuesday, that you were taken into custody yourself?—A. No, sir; that was two weeks later.

Q. Oh, two weeks later?—A. Yes, sir. I went away from Westport on the 4th of July to Greenwich, Connecticut, and there I had been until the 14th of July.

Q. Did you not leave Westport because you thought that was a good way to help little Norma out of trouble, did you?—A. No, sir.

Q. That never entered your mind at all, did it?—A. No, sir.

Q. You would not do anything to help yourself, that might hurt anybody else; would you?

Mr. CORREA. I object to it as argumentative, if your Honor please.

The COURT. It is argumentative.

Mr. CORREA. I think we have had a lot of argument on this subject.

Q. In any event you say just left Westport and went to Greenwich?—A. Yes, sir.

Q. The time that elapsed between the time Tony was talking to you up in his room, as you have told the jury, and the time you were arrested, was something over two weeks, wasn't it?—A. It was almost three weeks.

Q. Almost three weeks. Now during that time did you still continue to think that Tony was arrested because of the minute man?—A. No; I started to read the papers and then I realized.

Q. You started to read those papers about this on Sunday, the very day after Tony was arrested, didn't you?—A. I did not read the papers. I just saw the pictures.

Q. Well, just the pictures. But even if you had read dozens of pages it could not have made any bigger impression on you than seeing those pictures staring at you out of those newspapers, could it?—A. That is right.

Q. You understood what that meant all right, seeing those pictures there, and the headline above it or the title above it stating that they were saboteurs; you knew what that meant, didn't you?—A. Yes, sir.

Q. No amount of additional reading in the newspapers could make that impression any clearer to you, could it?—A. No, sir.

Q. During this two weeks or more that you were waiting there, didn't you think that maybe on reflection you ought to tell the authorities what you knew, if you knew it?—A. I didn't think so far.

Q. It did not occur to you that that was pretty important information if it was so?

Mr. CORREA. If your Honor please, I object to "if it was so" appended to this question.

Q. It did not occur to you that that was important information, did it?—A. I didn't think so.

Q. You didn't think so. In this interval of a couple of weeks did you make it a point to read the newspapers pretty carefully in so far as they referred to this particular matter?—A. No, sir.

Q. You just read them?—A. I did not read everything.

Q. That is what I mean. You read them but you did not take the trouble to read every little detail?—A. That is right.

Q. None of the things that you told the jury here was the result of what you read and those details that you got from the newspapers?—A. I beg your pardon?

Q. I say you did not get any of this that you have told the jury by reading it in the newspapers?—A. No, sir.

Q. And you don't mean to tell these jurors that you failed to read all that was in the newspapers because you wanted to conceal the fact that some of those details you did get from the newspapers, did you?—A. I did not get any details from the newspapers.

Q. But you still say that however much you may have
376 been interested in Werner Thiel, the fact is you didn't read all those newspapers for all the details about these saboteurs?—A. I did not.

Q. You did not. Were you afraid to read them?—A. No, sir; I was not afraid.

Q. You were not interested, you say?—A. I had no time.

Q. You had no time?—A. And it made me nervous.

Q. I notice that you referred to Werner in your answers as "Thiel". Is that what you called him?—A. I called him Werner.

Q. He was introduced to you by Tony, wasn't he?—A. Yes, sir.

Q. Was that just about the same time that you met Tony?—A. A few weeks later.

Q. And that was back in 1937?—A. Yes, sir.

Q. So that when you got down to '42 you had known Werner and Tony about the same number of years?—A. Yes, sir.

Q. Were you ever in love with Werner?—A. Yes, sir.

Q. You were? As a matter of fact when he left for Germany you were one of the persons that went down to see him off, weren't you?—A. Yes, sir.

Q. Did you cry when he left?—A. No; I did not.

Q. Were you sorry to see him go?—A. Yes, sir.

Q. Whether you cried or not you were pretty well affected by the fact that he was going away, weren't you?—
377 A. Yes, sir.

Q. Now when you saw his picture in this newspaper on that Sunday, June 28th, you knew he was the same man you were in love with, didn't you?—A. Yes, sir.

Q. Didn't you talk to anybody about it?—A. Yes, sir.

Q. And who was the person that you first spoke to about it?—A. Mrs. Lucy Kiel.

Q. Was that the person that you were employed by?—A. No, sir; she was a girl friend of mine.

Q. She was a girl friend of yours, and I take it that when you saw this picture of Werner in the newspaper you knew that he was in some trouble?—A. Yes, sir.

Q. Did it occur to you that because of your close relationship with him you might get in some trouble too?—A. I never thought of it.

Q. There were a lot of people who knew that you and Werner were practically engaged, weren't there?—A. Yes, sir.

Q. So that there was no mystery about that, was there?—A. No, sir.

Q. And yet you say that it did not occur to you that maybe you might get drawn into this trouble that Werner was in?—A. No, sir.

Q. Never entered your mind?—A. No, sir.

Q. Now we come back to the time that you got down to the FBI room. You remember I first thought that you were
378 brought down on the evening of Saturday the 28th of June. You remember that mistake I made?—A. Yes.

Q. That misapprehension or misunderstanding. Now when were you taken into custody?—A. In Greenwich, Connecticut.

Q. And when was that?—A. On the 14th of July.

Q. And that is the Tuesday that you were talking about when we got off on these other things that I have been questioning you about?—A. Yes, sir.

Q. What time was it that you were taken into custody in the early afternoon?—A. The agents called for me. I don't know exactly. Around 12 o'clock.

Q. Around the middle of the day?—A. Yes, sir.

Q. And I suppose they gave you a chance to get something to eat and took you to New York?—A. Yes, sir.

Q. And you got to the room upstairs in this building about when?—A. It was late in the afternoon.

Q. Say about 4 o'clock, something like that?—A. It was later than that.

Q. And then they questioned you, as I understood your testimony, about two hours?—A. Yes, sir.

Q. Now I want to get perfectly clear to this jury whether when you first went in there and you were first questioned you told the FBI men immediately just exactly what you have
379 told the jury here today. Now did you? Or did you hold back some part of it?—A. No, sir.

Q. You told the whole business immediately?—A. I don't know did I the first night.

Q. That is what I want to get clear. Which is the fact, that you stalled around to begin with and then told the story the next day, or that you came right out and told the whole thing immediately?—A. I had been asked about my personal affairs first.

Q. Well, I still ask you whether when you were first questioned by the FBI men you told them what you told the jury here today, or whether you told them that the next day. Now which is it?—A. I don't remember.

Q. You don't remember that. They questioned you that first night about what you knew about Tony Cramer, didn't they?—A. I don't remember.

Q. You don't remember. Was that because you were frightened?—A. No, sir.

Q. They did not do anything to frighten you at all, did they?—A. No, sir.

Q. Is it a fact that from the moment you were arrested you were worried more about Norma Kopp than you were about anybody else?—A. I was not worried about myself.

Q. You didn't give yourself a thought?—A. No, sir.

Q. Now if you held back anything in that first questioning with the FBI men it was not certainly to help Norma Kopp, was it?—A. I answered everything I had been asked the same night.

Q. Yes; but you told this jury very plainly that you do not remember whether you changed your story from the first time you spoke to the FBI men until the second time on the following day.

Mr. CORREA. Don't answer, please. If your Honor please, I do object to that statement and question by counsel, because it misstates my understanding of the testimony. As I understand it the witness has stated that she does not remember whether she told all of the facts which she stated here on the first night or the first questioning, whatever it was, but she has nowhere stated that she held anything back or that she changed her story, or that she was in any doubt about it. In fact she said several times quite the opposite. I think the question is misleading and I object to it on that ground.

Mr. MEDINA. If it is I surely did not intend it that way.

Q. Now I ask you for the last time, did you tell the FBI men when they first questioned you the same thing that you have told this jury here today?—A. Yes, sir.

Q. Now I thought you said a few moments ago that you could not remember whether you had or not. Am I wrong

381 about that?—A. I do not remember when I told it, did I tell the first night or did they ask me.

Q. Then the fact is, as I said, that you do not remember whether you told them that first evening the same thing that you have told the jury here today; isn't that the fact?—A. I did tell the truth, but I don't remember.

Q. Now are you perfectly clear that on that first occasion when they questioned you that you made no writing whatever?—A. Pardon, sir?

Q. You know, writing with a pen or pencil on a piece of paper?—A. Yes, sir.

Q. Do you know what that is?—A. Yes, sir.

Q. Did you do any of that the first time you were being questioned by the FBI men on the afternoon you were questioned by them?—A. I don't remember.

The COURT. Mr. Medina, the grand jury is waiting to report. Is this a good time to suspend; have you finished with this series of questions?

Mr. MEDINA. Well, it is perfectly agreeable to me to suspend now. I had not quite finished with that line of questions, but I see no reason why we cannot suspend now.

The COURT. Then we will take a recess until 2 o'clock in this case.

(Recess to 2 p. m.)

382 AFTERNOON SESSION

EMMA KOPP, resumed the stand.

Mr. MEDINA. I call for the production of the letter from Norma to Tony, which was one of the documents found in the defendant's room.

Mr. CORREA. Is that the one we just gave you a copy of?

Mr. MEDINA. That is the one you just gave me a copy of, pursuant to my request. And I would like to have the translation with it. I just want your copy to put in evidence.

Mr. CORREA. That is the original of the translation of the copy which we gave you [handing paper].

Cross-examination continued by Mr. MEDINA:

Q. I show you a letter and a translation and ask you if you can identify the letter as having been sent by you to Tony, and also whether you can identify the translation as being substantially accurate?

Mr. CORREA. We will concede the translation is accurate.

Mr. MEDINA. It is your translation. But if is all right.

Q. You have not any doubt that this is your letter, have you?—A. No, sir.

383 Mr. CORREA. We can have the translation subject to check.

Mr. MEDINA. Yes; pursuant to the same arrangement we have had as to all these translations. I offer the letter and the envelope and the translation as a single exhibit.

Mr. CORREA. No objection whatsoever.

(Marked "Defendant's Exhibit D.")

The COURT. That is a letter to the defendant Cramer?

Mr. MEDINA. That is a letter to the defendant Cramer: yes, your Honor.

Q. This envelope on Defendant's Exhibit D is postmarked Westport, Connecticut, June 15, 1942. Is that about the time that you wrote and mailed this letter, Exhibit D?—A. Yes, sir.

Mr. MEDINA. With your Honor's permission, I shall question the witness as to a point or two before I read this to the jury.

The COURT. Yes.

Q. At the time you sent this letter to Tony, of course you had no idea that Werner Thiel was coming to the United States, had you?—A. No, sir.

Q. And Werner Thiel was entirely out of your mind when you sent this letter?—A. Yes, sir.

384 Q. Without taking particular words into account, it is a fact that your disposition, your feeling, toward Tony was in every way friendly when you wrote this letter, wasn't it?—A. Yes, sir.

Mr. MEDINA. I think with your Honor's leave I shall read the letter to the jury. The letter itself is in German, which I do not read, and I do not imagine you gentlemen do, and I merely show you the envelope, not that it is of any particular significance as such, but it has on the back "Emma Kopp, care Mrs. H. E. Tate, Westport, Connecticut," giving the address, and I shall read the letter [reading exhibit to jury].

Q. Do you recall whether you visited occasionally the apartment that was occupied by Tony and Werner together?—A. Yes, sir.

Q. What was the address of that apartment, do you remember?—A. 164 East 85th Street.

Q. And about how long were Werner and Tony living there together in that apartment?—A. About three years.

Q. About three years. Did you go up there often?—A. Yes, sir.

Q. Did you stay overnight there ever?—A. No, sir.

Q. Did you stay there for meals with either Werner or Tony?—A. Yes, sir.

Q. As a matter of fact, you cooked a good many of those meals for them, didn't you?—A. Yes, sir.

385 Q. Did you used to make it a habit of doing that on your days off from your employment?—A. I did daytime work then.

Q. But I say, you went up there and cooked the meals for Werner and Tony on your days off?—A. On my evenings off.

Q. And you did that rather steadily over the three years that they were there, did you not?—A. Yes, sir.

Q. You had occasion to become quite intimate with Werner, didn't you? Saw a great deal of him?—A. Yes, sir.

Q. Do you recall whether you ever had any arguments or things of that kind with Werner?—A. Yes, sir.

Q. You did, did you?—A. Yes, sir.

Q. What were those arguments about?—A. About his personal behavior.

Q. You mean you were jealous of him?—A. No, sir.

Q. Were there ever made any mutual accusations that you thought he was going around with somebody else and he thought you were going around with somebody else?—A. No, sir.

Q. That never came up?—A. He did drink too much.

Q. And were all your arguments with him about his drinking?—A. Yes, sir.

Q. Did you ever have any arguments with him about his attention to any other women?—A. Yes; I had one.

Q. And the fact is too, that he remonstrated with
386 you about some man that he thought you ought not to see, didn't he?—A. (No answer.)

Q. Why do you hesitate?—A. I don't remember.

Q. There may have been such instances, but you don't feel sure, is that a way to put it?—A. No; there was a man he thought I had been going out with years ago.

Q. And did you and he quarrel about that?—A. Yes; we did.

Q. What was the quarrel about. I mean how did it happen to come up?—A. Whenever he met the man on the street they start to argue.

Q. Over you?—A. Yes, sir.

Q. You mean these two men were fighting about you?—A. Yes, sir.

Q. Werner Thiel and some other man?—A. Yes, sir.

Q. And you knew about that?—A. That these two always argued; yes, sir.

Q. Well, what was it that Werner Thiel was accusing that other man of doing?—A. He thought I did go out with the man years ago, which I never did. He was jealous of him.

Q. He was jealous of this other man?—A. Of this man.

Q. And was that one of the things that you used to fight with Werner about?—A. Yes.

387 Q. I suppose that came up rather frequently in those years that you were engaged to one another?—A. I have not been engaged to him until he left this country.

Q. Did you have your engagement arranged just a few days before he left?—A. Yes, sir; four days before he left.

Q. Four days before he left. So that as you were engaged to him when he left, you naturally expected him to return?—A. I did not expect him to return during the war.

Q. But you did expect that he would return some time, and that you would be married?—A. Under a new quota.

Q. Under a new quota? Was that the subject of some discussion between you and Werner?—A. We really never did discuss the case very anxious about coming back. I had in mind to go back to Germany to visit and then we would meet.

388 Q. Didn't you really expect to go back to Germany——A. To visit.

Q. To marry there and to stay there?—A. Not to stay there.

Q. Not to stay there?—A. No, sir.

Q. Did you know that this fellow Thiel was a Nazi?—A. I don't know that he was a Nazi.

Q. Just a kind of a Nazi?—A. He did discuss the daily news.

Q. Discuss the daily news?—A. The news every day, and listen to the radios.

Q. Are you trying to tell the jury that you don't know what a Nazi is?—A. Thiel had been a Nazi.

Q. Oh, he had been a Nazi?—A. When?

Q. But when you got engaged to him he swore off, did he?—A. He did not swear off.

Q. Well then you became engaged to him you knew perfectly well that he was a Nazi, didn't you?—A. Yes, sir; I did.

Q. And it is not just reading the papers, either, is it?—A. That is right.

Q. You knew from what he told you again and again that he was for Hitler and he was a Nazi?—A. Yes, sir.

Q. Isn't that the plain fact?—A. Yes, sir.

389 Q. Now isn't it true that when you became engaged to him just before he went back to Germany your intention was to go back to Germany as soon as you could and marry him and stay there with him?—A. No, sir.

Q. Didn't you think as a Nazi he was going to be a man of importance in Germany?—A. I know as soon as he would leave the country everything would be over for me.

Q. Let us see if I understand that. You got engaged to him just four days before he left; right?—A. Yes, sir.

Q. And then you say as soon as he left you knew everything was over for you?—A. Yes, sir.

Q. And that meant that you knew you would not ever be able to marry him?—A. That is right.

Q. You never became an American citizen, did you?—A. No, sir.

Q. And you tell this jury that when Thiel left you had no intention of going and living with him permanently in Germany; that is what you say, isn't it?—A. I had no intention to go back forever.

Q. No intention to go back and marry Thiel and stay in Germany?—A. No, sir.

Q. You were going to make this country your permanent home, weren't you?—A. Yes, sir.

Q. And at some time you expected Thiel to come back, or didn't you expect him to come back?—A. He did discuss that question once with his friends, and he know' if he will come back to this country after the war he has to come under a new quota, otherwise he could not enter.

390

Q. I did not mean to ask you for a conversation. I am asking you about what you yourself were thinking, and I repeat, that it was all over, as you expressed it, when he went back, or did you think he was coming back to marry you here?—A. No, sir; I did not think for him to come back here to marry me.

Q. Your real state of mind was that you considered everything was over between you and Werner Thiel when he left?—A. Yes, sir.

Q. Now did the thought ever occur to you that you might apply for American citizenship after being here all these years?—A. Yes, sir.

Q. But you did not do it, did you?—A. I did take my first papers out.

Q. You did what?—A. My first papers, in 1929.

Q. In 1929 you made your declaration of intention to become a citizen?—A. Yes, sir.

Q. And you filed that somewhere here in New York, did you?—A. In Chicago.

Q. Is it a fact that whatever your intention might have been in 1929, that you later decided not to go ahead with it?—A. I never decided not to go ahead with it.

Q. That is, without making any decision, you just did not go ahead with it?—A. I could not go ahead.

391

Q. There was something to prevent you from going ahead?—A. Yes, sir.

Q. And what was that?—A. I kept on travelling. I had not

been in Illinois for five years, which I was supposed to be to apply for my citizen papers.

Q. There were three years that you were going up there cooking meals for Werner Thiel and Tony Cramer. During those three years did you move from one family to another as a domestic servant?—A. I beg your pardon, the five years had been in Illinois, and those three years in New York.

Q. But I say I am only asking you about the three years in New York now for a moment, and I take it you say that those three years that you were in New York make three continuous years all right and you raise no question about that?—A. Yes, sir.

Q. When was the first of those three years, can you give us the date, when you started to go up to the apartment and cook meals for Werner and Tony?—A. In September 1938.

Q. September, '38?—A. Yes, sir.

Q. And prior to May 1938, were you somewhere other than New York City or the surrounding——A. In Chicago.

Q. You were in Chicago. So that that you came from Chicago to New York in 1938?—A. That is right.

392 Q. And is it your statement that if you had resided in New York continuously for five years you would have applied for American citizenship?—A. I would; yes, sir.

Q. That is what I say, you would have?—A. Yes, sir.

Q. If the five years had occurred?—A. Yes, sir.

Q. Now whether you could have or could not have applied for American citizenship, the fact remains, does it not, that in June 1942, you knew that you were not an American citizen, didn't you?

Mr. CORREA. I object.

A. Yes, sir.

Mr. CORREA. I object, if your Honor please, to the form of that question. I think the witness has stated she was not a citizen, and counsel ought not to go on.

Mr. MEDINA. The form is a little argumentative. I merely want to get at the fact.

Mr. CORREA. The fact was stated several times previously I think Judge.

Q. Is it or is it not a fact that in June 1942 you knew you were not an American citizen?—A. Yes, sir.

Q. And you knew at that time, did you not, that you were a native born German?—A. Yes, sir.

Q. And you knew, did you not, that in June 1942, you were what is described here as an enemy alien?—A. Yes,

393 sir.

Q. Had you registered as an enemy alien?—A. Yes, sir.

Q. Did the thought cross your mind after you saw Tony arrested

that maybe there was a possibility you might be imprisoned as an enemy alien if you had done something wrong?—A. I beg your pardon?

Q. Did it occur to you after you saw the FBI man take Tony out of the Kolping House that Saturday night, that maybe you might be taken off to prison as an enemy alien?—A. No.

Q. As you saw him taken out by that FBI man did you think at all about the fact that you were an enemy alien and not a citizen?—A. No, sir; I never thought of that.

Q. Did the thought occur to you that maybe it would be a good idea for you to conform your conduct or to do or act in such a way as to prevent yourself being taken into custody as a German-born enemy alien? Did you even think about that?—A. No, sir.

Q. That thought never entered your mind at all at that time?—A. No, sir.

Q. You remember this morning you referred to a copy of the Times of Sunday, June 28th?—A. I did not read the paper that Sunday.

Q. Well you tell about it in your own way. What was it you saw?—A. The pictures of the eight saboteurs.

394 Q. In what paper?—A. The Times.

Q. On what day?—A. The 28th of June.

Q. What year?—A. 1942.

Q. Now take a look at this and see if this is not the paper that you had reference to [indicating]?—A. Yes, sir.

Q. That is the very page you were looking at, isn't it?—A. Yes, sir.

Mr. CORREA. You better mark that for identification.

Mr. MEDINA. Yes; I ask that this be marked for identification. I think perhaps it may be marked on the outside of the paper. We know that the reference is at the moment to page 30.

(Marked "Defendant's Exhibit E" for identification.)

Mr. CORREA. Put it in evidence if you want to; we have no objection.

Mr. MEDINA. I know which I want to offer things.

Q. Now you have been very careful to explain that you did not read a word of the printed matter, haven't you?

Mr. CORREA. If your Honor please, I don't think counsel should characterize the witness's testimony, "you have been very careful to explain." We have had a number of such things and I have not objected, but it seems to me now that it has been repeated——

395 The COURT. I don't think it is a very good practice.

Mr. CORREA. To such an extreme that I do interpose the objection.

Mr. MEDINA. Does your Honor rule that I must take the "very careful" out? Then I will reframe it.

The COURT. No; I think it is objectionable. It is telling the witness she has been very careful to——

Mr. MEDINA. I say I am willing to take the "very careful" out and reframe it.

The COURT. You say she has been very careful to refrain from saying it.

Mr. MEDINA. Well, I think, your Honor, your paraphrase of my question has changed the question a little bit, but the verbiage of it is of no importance. I will reframe it.

The COURT. The point is that you say she has been very careful to explain she did not read it.

Mr. MEDINA. If that is the fact. I think I will bring it out. I am entitled to bring it out, and I would prefer with your Honor's leave to reframe the question.

396 Q. Did you not testify this morning that you had not read any of the printed matter on the page of the Times where the picture of these men appeared?—A. I have not read the paper.

Q. And I say you testified this morning that you did not read any of the printed matter on that page. Did you not so testify?—A. Yes, I did.

Q. And the fact is that you did not, as you claim?—A. I did not.

Q. Now I ask you, did you have any reason to tell the jury that you had not read any of the printed matter on that page?—A. I have no reason.

Q. I wonder if you would take a glance at the page now, and look over that printed matter [handing paper]. Just take your time reading it for a few moments.—A. (Witness complies.)

Q. Do you still say that you never read that before?

Mr. COREY. I object, if your Honor please, to the question unless the paper is put in evidence, because the implication of the question is that there is something in that exhibit which is contrary to what the witness's testimony has been. I don't know whether there is or not, but I think the jury is entitled to know, if such line of interrogation is going to be pursued, and I have no objection to the question if the exhibit is offered,

397 but I think otherwise it is improper.

Mr. MEDINA. I should rather explain my own purposes myself, your Honor. I have made no claim that there is anything in that paper that contradicts this witness, and I see no reason why I should offer it until I feel that I desire to offer it. Does your Honor?

The COURT. I don't think you are compelled to offer it. I think if the Government thinks there is no contradiction it may offer it in evidence.

Mr. CORREA. I am willing to offer it right now, Judge, if there is any question about it.

Mr. MEDINA. Do you?

Mr. CORREA. Yes.

Mr. MEDINA. No objection.

(Marked "Government's Exhibit 76.")

The COURT. What page is that?

Mr. MEDINA. That is page 30, your Honor, and I take it the offer is not made as proof of the facts therein, but merely that there is a page of the Times containing that printed matter.

Mr. CORREA. Yes; we will agree we are not offering the newspaper as proof of the facts stated therein, and I will offer so much of the paper as counsel for the defendant wants.

398 Mr. MEDINA. I am afraid this is getting into a sort of a game, your Honor. I do not really like to have that happen in a case like this.

The COURT. You are in the game.

Mr. MEDINA. I think I can play it as good as some of them but I do not like playing games in a case like this.

Mr. CORREA. I don't either, Judge. I wish it had not been started.

Mr. MEDINA. I resent that remark. I started playing no game. I asked the witness a question, and I resent that and ask that that remark be stricken out.

Mr. CORREA. Counsel apparently thinks it is all right to charge the Government with playing games, but—

The COURT. That will be stricken out. Go ahead. There has been very little of that sort of thing in the case, and let us not have any more.

Q. Now to resume, Miss Kopp, did you or did you not ever before this afternoon read the printed matter now in evidence on page 30 of that exhibit?—A. Pardon me?

The COURT. What is the difficulty?

The WITNESS. I do not understand that question.

Q. Don't understand the word "exhibit"? Well, you see this page with the number 30 on it there, don't you?—A. Yes, sir.

Q. You see that on that page there are certain photo-
399 graphs, don't you?—A. Yes, sir.

Q. You see that the balance of that page has printed matter, don't you?—A. Yes, sir.

Q. Did you ever before this afternoon read the printed matter on that page?—A. No, sir.

Q. Now there is no doubt in your mind about that, is there?—A. No, sir.

Q. You did notice on that page a photograph of the man you were engaged to marry, didn't you?—A. Yes, sir.

Q. And yet you tell this jury that you did not take the trouble to read the printed matter when you saw that paper first on Sunday, June 28th?—A. I did not read the paper.

Q. Did anyone read it to you?—A. No, sir.

Q. Was the contents of that printed matter in any other manner conveyed to you on that day?—A. I beg your pardon?

Q. Did somebody else explain it to you and say what was in the printed matter?—A. No, sir.

Q. So that your story is that you saw Thiel's picture there——A. That is right.

Q. And you did not even take the trouble to read——

Mr. CORREA. Just a moment, Mr. Medina. I object to the last question and the witness's answer, and I move to strike it
400 out. It reads "So that your story is," and I submit that is an improper characterization of the witness's testimony, and the witness is testifying under oath and I don't think the witness's testimony should be characterized as "your story."

The COURT. Substitute the word "statement."

Mr. MEDINA. With all due deference to your Honor, I do not choose to do that. I think I am within my rights.

The COURT. Then I sustain the objection.

Mr. MEDINA. And I except to your Honor's ruling.

Q. I understand you have already told the jury that there is absolutely no reason why you should not admit that you read that printed matter if you did read it; no reason in your mind for saying that you did not read it if you did?—A. That is right.

Q. Now when Tony told you that your fiance, Werner Thiel, was in New York, you did not believe him, did you?—A. I did not.

Q. But nevertheless the next day, which was Saturday, you met Tony in order to go with him down to Thompson's, to see if Werner was going to be there?—A. Yes, sir.

Q. Now when you go out, do you sometimes dress up a little bit? Do you understand what I mean by that?—A. Yes, sir.

Q. If a girl wants to go out with her fiance sometimes
401 she makes a little effort to make herself look as well as she can. You understand what I mean by that, don't you?

A. Yes, sir.

Q. Isn't it a fact that you did that on that Saturday morning?—A. I had dressed myself that Saturday afternoon.

Q. But I mean not merely that you dressed yourself. I know you would not go out without putting your clothes on, but I mean you made a special effort to make yourself attractive?—A. Not to meet Thiel. It was my day off, the only day in one month. I wanted to look nice.

Q. And whether you did it for the purpose of impressing Thiel or not, the fact is you dressed up to look your best that day?—A. Yes, sir.

Q. Now before Thiel went back to Germany you knew that he was not an American citizen, didn't you?—A. Yes.

Q. Did you think that maybe he had filed his first papers?—A. I don't remember.

Q. As I understand, what you are telling these jurors, it is that you honestly intended to be an American citizen as soon as you could?—A. Yes, sir.

Q. That there is no doubt about?—A. Yes, sir.

Q. Now did you think that Werner was going to become an American citizen, too?—A. No.

402 Q. Didn't you know perfectly well that he had never the slightest intention of being a citizen of the United States?—A. I do not know.

Q. You must have talked to him about that when you were going to marry the man, didn't you?—A. No, sir.

Q. Shall we leave it this way: that you never knew one way or another whether Thiel had an intention to become an American citizen, or whether he did not? Is that a fair way to put it?—A. I never heard him say anything about this question.

Q. But I am asking you, Miss Kopp, for the state of your mind. Did you think Werner Thiel was going to become an American citizen or that he was not?—A. If this war had not come I think he would have become an American citizen.

Q. Well, I am referring to the time he went back to Germany, which is a time when the United States and Germany were not at war, and I ask you with reference to that time did you think he was going to become an American citizen or not?—A. I do not know.

Q. You just didn't know?—A. I didn't know.

Q. Did you know this much: that before he left for Germany neither he nor you were in fact American citizens? You knew that, all right?—A. Yes, sir.

Q. Did you know that he had failed to register for the draft?—A. As much as I knew he told he did register.

403 Q. Do you mean to tell these jurors that there was discussion between you and Thiel on that point?—A. We did not discuss that point.

Q. He never mentioned anything one way or another?—A. Yes; he mentioned once that he has to register up to 35, age of 35, and he is included also.

Q. But whether he did or did not register, he never told you?—A. No, sir; I do not know.

Q. You see I do not like to leave these things in an ambiguous

state, and so I go back; he did tell you that he would have to register, didn't he?—A. Yes, sir.

Q. Now he did not tell you, as I understand your testimony, one way or another, whether he did register?—A. I don't remember.

Q. You don't remember anything about that?—A. No, sir.

Q. So that if he spoke to you on the subject, you have at the moment no recollection of what he said, is that right?—A. I beg your pardon. I do not understand.

Q. You say you don't remember. You remember saying that?—A. Yes, sir.

Q. Now do you mean by those words that today as you sit here, you have no recollection of anything that Werner Thiel told you on that subject?—A. That is right.

Q. Had you ever heard from any source that whether or
404 not Werner Thiel registered for the draft, that there was a time when the draft board was looking for him?—A. I do not remember.

Q. Did you ever hear that at any time from any source anywhere?—A. I do not remember.

Q. You don't remember?—A. No, sir.

Q. If it came to your attention that the draft board or the public authorities here were looking for Werner Thiel, that would be of interest to you, wouldn't it?—A. I don't know.

Q. But he was the man you were going to marry. Wouldn't you be interested to know whether he was going to jail or not?—A. (No answer.)

Q. Don't you understand that?—A. No, sir.

Mr. CORREA. I think I will object to that, if Your Honor, please; that this is argument with the witness. The question is if the authorities were looking, would you do this or that or the other. I think that is both hypothetical and argumentative and therefore improper.

The COURT. I thought the question as I heard it was proper. Will you read it, please.

(Question read.)

Mr. CORREA. I think, in turn, that is based on a prior question, if the authorities were looking.

The COURT. I think the question is all right. Now do you know what the question is, Miss Kopp?

405 The WITNESS. Yes, your Honor.

The COURT. All right. If you will answer it so that the jury can hear you.

The WITNESS. I do not think that I would be interested.

Q. You don't think you would be interested?—A. No, sir.

Q. Not much. In any event, if anything was told you on the subject it left no impression on your mind, did it?

The COURT. Perhaps that word "impression" is a little hard for her to understand.

Q. May we say this, Miss Kopp: that if somebody said something to your about the draft board looking for Werner Thiel, it left no recollection with you? You just don't remember it if somebody told you such a thing?—A. Does that mean now?

Q. What is that?—A. Does that mean in this case or right here?

Q. Right now. Let me ask you another question: are you worried here for fear that you may get mixed up in something if you answer the question one way or another?—A. No, sir.

Q. That is the last thing you are thinking about, isn't it?—A. That is right.

406 Q. Now I ask you again, if somebody told you at any time that the draft board was looking for Werner Thiel, is it the fact that that has gone out of your mind and you cannot remember whether they told you or whether they did not?—A. I would go and give information about him; that he is not here any more.

Q. If you had heard that the draft board was looking for him, you would have gone and done something about it right away?—A. Yes, sir.

Q. So that the result of your thinking here and hesitating has made you remember, and you answer now that if you heard anything about that, you would go right to the authorities?—A. Yes, sir.

Q. But during the time you were hesitating in answering my questions you were not thinking what would be the best answer for the benefit of Norma Kopp, were you?—A. No sir; I did not understand the question right.

Q. Do you get the impression that I am using words that are big words and hard to understand?—A. Yes, sir.

407 Q. Referring to Government's Exhibit 76, and particularly to page 30, there is the statement in the first column with the heading or sort of subheading "U-Boats Came Close to Shore." Did you notice that heading in that big black type on that first column [indicating?] And I am referring to June 28, 1942. Did you notice that?—A. Now I notice it.

Q. No; I am not asking you whether you notice it now. I am asking you whether you noticed that on the day that you saw that picture of Werner Thiel in there?—A. I did not read the paper that day.

Q. I know you said that, Miss Kopp, but what I am asking you is whether you observed that heading there with the words "U-Boats Came Close to Shore"?—A. No, sir. I just looked at the pictures.

Q. But this type which we call bold-faced type, which means big type and big black type, was right alongside of the picture.—A. I have not seen any printing, sir.

Q. Now it says right under that "Under the cover of night the submarines came within 500 yards of the Long Island and Florida coasts." You did not see that either?—A. No, sir.

Q. And down here a little further down in the paper also in that big black type it has a heading entitled: "Landed in Rubber
408 Boat." You did not see that, did you?—A. No, sir.

Q. And right under that it says: "The first invasion of the saboteurs was at Amagansett Beach, Long Island, last June 13th. The submarine reached the coast at night and surfaced. A rubber boat was put outside." Really, didn't you see that?—A. I have not seen the paper.

By the COURT:

Q. Miss Kopp, will you tell us where you saw the newspaper, and under what circumstances? Was it your newspaper?—A. No, sir; somebody else bought it on a Sunday afternoon at 5 o'clock.

Q. How did you happen to look at it at all?—A. A friend of mine owns a restaurant. He went out and bought the Times and he opened it and showed me the pictures. I looked at it and that was all.

Q. Where was it?—A. On 1575 Third Avenue.

By Mr. MEDINA:

Q. Nothing prevented you from going out and buying a copy of that paper for yourself, did it?—A. I was not interested to buy a paper.

Q. You were not interested about a paper. You would not even take the trouble to buy one for yourself, would you?—A. They always is a paper in all my friends' houses where I go.

Q. And you don't mean to leave the impression that you
409 did not have a chance to read this printed matter if you wanted to?—A. I had a chance, but I did not want to read it.

Q. Now I notice right alongside of the picture with the faces of these men, including your fiance Werner Thiel, some more of this big black type that says "Werner Thiel" and then there is a little paragraph just about Werner. Didn't you even notice that?—A. No, sir.

Q. Do you see it right there [indicating] You read English all right, don't you?—A. Yes, sir.

Q. "Werner Thiel"—didn't you see that?—A. I did not read anything.

The COURT. Did you have the paper in your hand at the time?

The WITNESS. It was laying in front of me on the bar, your Honor.

Q. Well you had it in your hand looking at it, didn't you?—A. I did not have it in my hand.

Q. Would not even put your hands on it?—A. No, sir.

Mr. MEDINA. With your Honor's permission I should like to read certain portions of this newspaper to the jury.

Mr. COLEY. No objection.

Mr. MEDINA. (to jury). You gentlemen will all observe the pictures of these men, with those other pictures there, and then it has "Saboteurs seized—landed by U-Boats." In the first place I do not know whether you can all see those bold faced prints there. "U Boats Came Close to Shore. Under the cover of night the submarines came within 500 yards of the Long Island and Florida coasts," and it goes on to describe about that. And there is here a heading again that says "Landed in Rubber Boat," and it tells all about the landing in the rubber boat. And then up here in the first column another bold-faced heading, and it says "Group came to New York. With the cases buried the crew of saboteurs came to New York and split up. They had been here a week when the FBI arrested three of them on June 20." And it goes on to describe about that. It goes on also to describe about the money. That describes the Florida group, and then says: "The money was not the reward of the German spies. They were promised fabulous sums," and so on, "when they returned to Germany after accomplishing their assignments. They were also authorized to offer similar promises to win cooperation," and so on. "Their instructions were to use the money to bribe Americans." And then up here there is a reference to this William Thomas, the name that was used by Thiel. Also that Herbert Neubauer went to Chicago, a third, Werner Thiel, went to New York and registered at a large hotel as William Thomas. And so over here there is this piece just about Werner Thiel. You see there is a little sort of separate part in the paper about each of these men, and here is the one about Thiel. "Born in Essen in 1907, Werner Thiel, known as John Thomas and William Thomas, came to the United States as a youth," and so on, and so forth.

Later your ladies and gentlemen can see the whole article. There may be other things in there of a similar nature, but I do not want to take too long going over it. If you gentlemen would like to glance at it I will—oh, yes; you see it says "Saboteurs Landed in U. S. by U Boats" and equipment they planned to use destroying key-war plants, and the whole business is in there.

Q. Now, Miss Koppel, did you take the trouble to notice that this

page 30 was a continuation from page 1 of this issue of the New York Times, Government's Exhibit 76?—A. No, sir.

Q. You did not turn back to see what there was on page 1?—A. No, sir.

Q. On that same subject?—A. No, sir.

Q. I recall that you said after you spent the evening of Friday, June 26, 1942, with Tony you went home. Did I misunder-
412 stand that?—A. We both went to the Kolping House.

Q. You both went to the Kolping House?—A. Yes, sir.

Q. There came a time when you both left the Kolping House, didn't there?—A. Yes, sir.

Q. And where did you go after you left the Kolping House?—A. We did go with Mr. and Mrs. Kiel up to 91st Street and Third Avenue.

Q. Went with Mr. and Mrs. Kiel up to 91st Street?—A. Yes, sir, and Third Avenue.

Q. There must have come some time when you went somewhere for the night, didn't there?—A. We parted and Tony did bring me home.

Q. You parted and Tony brought you home?—A. Yes, sir.

Q. That is just the part I refer to. Now what was home?—A. I have a room on 248 East 87th Street.

Q. A room?—A. I kept that room while I worked in the country.

Q. What did you keep that for?—A. For convenience.

Q. Well I thought you only came in from Westport about once a month.—A. Yes, sir; I could not take all my clothes along, and for that I kept the room.

Q. You kept the room as a place to keep your clothes in?—A. Yes, sir.

Q. Well didn't that cost you money?—A. Yes, sir.

Q. And you really mean to say these people you were
413 working for would not let you bring your clothes out there?—A. Oh, yes; they would.

Q. But you did not want to do that?—A. That is right.

Q. You would rather have a place to keep them where you hired a room for them?—A. Yes, sir.

Q. Now didn't you have that room for some other purpose than keeping your clothes in?—A. Just for that purpose.

Q. And you only came in once or twice a month?—A. Once a month.

Q. Once a month, and then you would stay up there in that room?—A. Yes, sir.

Q. And all you used it for was just to go up there that once a month and stay there?—A. Yes, sir.

Q. How many years had you had that room there?—A. I just moved in on the end of May, and on the 1st of June I went to Westport.

Q. And before May did you have another room for a similar purpose somewhere else?—A. I worked in Jersey and came in once a month also, but then I had to take a room somewhere, and that is why I thought it cost me just as much to keep a room and then I know where to be.

Q. But I say over this period of a year or so you always had a room somewhere where you kept your clothes?—A. No, this is the first room I had to keep my clothes. When I was in Jersey I had all my clothes with me.

414

Q. So when you came in from Jersey to spend your night off, why, you just went to a hotel somewheres?—A. To a rooming house with friends.

Q. When this Saturday evening, June 27th, came around do you remember that you and Tony were up in the Kolping House?—A. Yes, sir.

Q. And you remember how the FBI man came in and he took Mr. Tony Cramer away with him?—A. Yes, sir.

Q. Now when Tony was arrested were you sitting with Tony there?—A. Tony had just left our table to another table with card players. He looked at them for about five minutes.

Q. So that when the FBI man came in and arrested Tony you were not with Tony at all?—A. No, sir.

Q. The FBI man would not have any reason under the sun to know that Tony even knew you?—A. That is right.

Q. Because you were over at the other side of the room with some other people?—A. That is right.

Q. When you got that letter from Tony asking you to come in to New York you didn't leave that letter around Tony's room, did you?—A. I beg your pardon?

Mr. MEDINA. May I have that letter [Mr. Goodkind hands paper to Mr. Medina]?

Q. I show you Government's Exhibit 75. That is the letter that Tony sent you [handing to witness]. Do you recognize it?—A. Yes, sir.

415

Q. Now on the evening of Saturday, June 27, 1942, where was this letter?—A. This letter was in Westport, Connecticut.

Q. So that when the FBI men went up to Tony's room after they arrested him they would not find this letter there, would they?—A. No, sir.

Q. You had it in your custody out at Westport?—A. Yes, sir.

Q. Did it occur to you when the FBI men finally came around and took you into custody that it was mighty queer how they

knew about you if they had not heard about you from Tony?—A. I beg your pardon, sir: I did not understand the first thing.

Q. I say there came a time when the FBI men arrested you too, didn't they?—A. Yes, sir.

Q. And they brought you right down here to this building?—A. Yes, sir.

Q. Now when they arrested you didn't you begin to wonder how they happened to find Norma Kopp?—A. No, sir.

Q. It seemed the most natural thing in the world to you, did it?—A. Yes, sir.

Q. You did not think it was due to anything that Tony had told them about you, did you?—A. I did not think anything.

416 Q. That was one time when your mind was not working?—A. That is right.

Q. In any event you never felt any animosity, any feeling of revenge toward Tony, on account of your being brought into this, did you?—A. I do not understand the question.

Q. That is some more long words—too big for you, are they?—A. Yes, sir.

Q. Do you understand what it means to want to have some revenge against somebody, or is that a word that you do not understand?—A. I understand.

Q. You understand that all right, don't you?—A. Yes, sir.

Q. You understand what it is to be mad at somebody?—A. Yes, sir.

Q. If they do something to hurt you.—A. Yes, sir.

Q. You might want to get back at them?—A. Yes, sir.

Q. You understand that kind of talk, don't you?—A. Yes, sir.

Q. Did you want to get back at Tony for maybe saying something about you that led to your own arrest?—A. No, sir.

Q. That thought never occurred to you?—A. No, sir.

Q. You never blamed any of that upon Tony?—A. No, sir.

Q. How did you think that the FBI men happened to pick you up?—A. I didn't know.

417 Q. Didn't you think about it a little as you were coming down to New York with them in the train and you were sitting there?—A. Tony had my address in his room.

Q. Tony had your address?—A. In his room.

Q. So you thought possibly the reason they came after you was that Tony had given them your name and address?—A. Not given them.

Q. Well, why not?

Mr. CORREA. I think that is argumentative, if your Honor please, "Why not." Especially since the witness has already stated, though I do not know whether counsel heard her—she said something about having the address in his room.

Mr. MEDINA. I understand why you are commenting that way, Mr. Correa.

Mr. CORREA. I don't know what you mean.

Q. Now we come back. Did it not seem to you very natural that Tony should have furnished the FBI men with your name and address?—A. I don't think so. I didn't think so.

Q. You think it is more natural to suppose that Tony would have kept you out of it entirely?—A. Yes, sir.

Q. And that if anybody found out about you the last man in the world to tell them would be Tony Cramer?—A. That is right.

418 Q. So that your only explanation to yourself for their finding you was that when they searched Tony's room they must have found some paper there with your name and address on it?—A. That is right.

Q. And that is what you were thinking?—A. Yes, sir.

Q. That day when they arrested you?—A. I did not think that day when I was arrested.

Q. And as you thought about it later you thought those things up, about Tony not telling about you, and about how they must have found the name and address up in the room?—A. I was not so interested to think about that.

Q. Well I thought you told the jury just a moment ago that you did think that way, namely, that Tony would be the last man to tell them?—A. Yes.

Q. And they must have found a paper up there with your name and address on it.—A. Yes; but I did not worry about Tony being the one to give me name away.

Q. I did not ask you whether you were worried. I was asking you whether or not at the time and on the day you were arrested you thought that Tony would not have given your name and address, but that the Government agents must have found something in his room giving the name and address. Didn't you say that you thought that?—A. Yes.

Q. And the fact is, is it not, that you did think that
419 on that day that you were arrested? The words too big for you?—A. No, sir.

Q. Now, what is the answer?—A. Yes.

Q. You did think that onthat afternoon of June, or whatever the day was in July, when you were arrested?—A. Yes, sir.

Q. I did not understand clearly from your direct examination whether you left Mr. Tate's in Westport of your own accord or whether you were discharged. Do you know what the word "discharged" means?—A. Yes, sir.

Q. It means fired. Now, did you leave of your own accord or were you dismissed?—A. I left on my own accord.

Q. Did you leave a forwarding address with Mrs. Tate?—A. No, sir.

Q. You were not trying to get away so that you could not be questioned by the FBI men, were you?—A. No, sir.

Q. The fact that you did not leave a forwarding address was just that you did not think about it?—A. That is right.

Q. Is that it?—A. That is right.

Q. Of course if any mail came for you or anybody came out there looking for you, it would be hard for them to find you without a forwarding address, wouldn't it?—A. I did the next day.

420 Q. What is that?—A. I did forward my address the next day.

Q. The next day you sent a forwarding address to Mrs. Tate, did you?—A. No; to the FBI in Hartford.

Q. I take it what you mean in substance to say is that you were registered as an enemy alien and hence you had no right to go from one place to another without informing them, and that when you left Mrs. Tate's you informed the appropriate office of the FBI where you had gone?—A. Yes, sir.

Q. Now do you know what an enemy spy is, or is that one of those big words?—A. I understand.

Q. Are you a German spy?—A. No, sir.

Q. Has anyone ever approached you to be a German spy?—A. No, sir.

Q. Do you know anything about any Germany spy ring here in this country?—A. No, sir.

Q. Have you had anything to do with German spies one way or another, directly or indirectly?—A. No, sir.

Q. You are absolutely positive about that?—A. That is right.

Q. And you know how bad a thing it is to do such a thing, don't you?—A. Yes, sir.

Q. And yet when Tony told you the things that you say he told you on that evening of June 26th you didn't com-

421 municate with any of the public authorities, did you?—A. I did not believe it.

Mr. MEDINA. That is all.

Redirect examination by Mr. CORREA:

One question, or one or two questions, Miss Kopp. You stated that you came down to this building on the 14th of July; is that correct?—A. Yes, sir.

Q. That was the first time you had been questioned by the FBI about this matter?—A. Yes, sir.

Q. And you were questioned that day or that afternoon and evening for a couple of hours; is that correct?—A. Yes, sir.

Q. And then again the following morning?—A. Yes, sir.

Q. There would seem to be some confusion as to whether you told the FBI all of the same things in the first two hours that you told here on the stand?—A. Yes.

Q. And you said you did not remember. Is that right?—A. I don't remember.

Q. Well do you mean that you don't remember whether or not you told them something that was not true, or you do not remember whether or not your interview covered all of the subjects that have been covered here?—A. I remember I did tell the truth.

Q. Is what you do not remember whether you were asked
422 all of the same questions you have been asked here?—A. That is right.

Q. That is, you do not know whether you were asked all those questions that night or the following morning?—A. That is right; that is what I meant, I did not remember.

Q. Excuse me?—A. That is what I meant, I did not remember.

Q. Did you mean to imply by any answer you gave when you were being examined along that line by counsel for the defendant Cramer, that you had given any statement to the FBI which you knew to be false?—A. No; there was nothing false.

Q. And every time you were questioned you answered the truth as you knew it?—A. Yes, sir.

Q. Is that correct, ma'am?—A. Yes, sir.

Q. Now, ma'am, I believe you stated on cross-examination that when first you were interviewed or questioned at the FBI office you did not sign anything. Is that right?—A. The same night?

Q. Yes; that night.—A. I don't remember that I signed the same night.

Q. Well, do you remember that at some time either on that evening or the following day you did sign a statement?—A. Yes, sir.

Q. And you read the statement before you signed it?—
423 A. Yes, sir.

Q. And that it set forth accurately what you had told the FBI?—A. Yes, sir.

Mr. MEDINA. I object to this, your Honor. I do not see that it is at all relevant or proper on redirect examination, or indeed on direct examination. This is a Government witness.

Mr. CORREA. Your Honor, I am not going to press the point. I thought some point was made here to the effect that the witness had changed her testimony since she first spoke to the FBI, and I have her statement here, and frankly I propose to mark it for identification. So should there be any question it is available.

Mr. MEDINA. I have no objection to it being marked for identification, your Honor.

Mr. CORREA. If counsel is pressing the objection I will desist as

to this line. It seemed to me an appropriate line of redirect in view of the cross-examination, I confess.

The COURT. What is your position, are you marking it now for identification?

Mr. CORREA. I have not identified it yet, your Honor. I was engaged on that when the objection was interposed. May I have it marked for identification?

(Marked "Government's Exhibit 77" for identification.)

424 By Mr. CORREA:

Q. I show you Government's Exhibit 77 for identification [handing to witness], and ask you, Ma'am, is that the statement which you signed on the occasion which you describe?

Mr. MEDINA. I object to that, your Honor. I object to any questions or inquiry with respect to this written statement, as irrelevant and improper.

The COURT. No; I think that is a proper question.

Mr. MEDINA. I respectfully except.

A. Yes; this is the statement, and I signed this.

Q. I direct your attention to the last page. Is that your signature appearing thereon?—A. Yes, sir.

Mr. MEDINA. Same objection.

The COURT. Same ruling.

Mr. MEDINA. Exception.

Q. Will you leaf through it and look at the bottom of each page, and tell me whether or not the initials E. K. appearing on each page were placed there by you?

Mr. MEDINA. Same objection and exception. The tenor of my objection, if your Honor please, is that inevitably these questions will leave an impression, which I do not think it proper to have left. I think the whole subject of any such statement as this is improper and irrelevant. I understand your Honor has

424-A ruled against me on that.

The COURT. Yes; I do rule against you.

Mr. MEDINA. I note an exception.

The COURT. It is not offered in evidence yet.

Mr. MEDINA. I understand, but my point is that these preliminary questions have much the same effect.

425 Q. Have you looked at those initials, Miss Kopp?

Mr. MEDINA. Same objection.

The COURT. The same ruling.

Mr. MEDINA. Exception.

A. Yes, sir.

Q. One further question, ma'am: did the agents of the Federal Bureau of Investigation threaten to cause you to be interned as an alien enemy if you did not——A. No, sir.

Q. (Continuing.) Tell them what they wanted or anything of that kind?—A. No, sir.

Q. Did they make any threats to you?—A. No, sir.

Q. Were you treated courteously?—A. Yes, sir.

Mr. CORREA. That is all.

Mr. MEDINA. No questions.

Mr. CORREA. The Government rests, if your Honor please.

Motion to dismiss indictment and order thereon

Mr. MEDINA. We move to dismiss the indictment on the ground that the Government has not proved facts sufficient to constitute the crime as charged.

The COURT. The motion is denied.

Mr. MEDINA. We respectfully except. Now I think, if your Honor please, I would prefer to start our defense on Mon-
426 day. It is only a short time that we have. We were going to adjourn at four ten, and I should not want to just get into the preliminaries.

The COURT. I think that is a quite reasonable request. I promised earlier in the week that you would be able to get away by 4:10.

Mr. MEDINA. Yes, your Honor.

The COURT. Then we will adjourn this case until Monday morning at half past ten.

(Adjourned until Monday, November 16, 1942, at 10:30 a. m.)

427 [Title omitted.]

NEW YORK,

November 16, 1942, 10:30 a. m.

Trial resumed.

Mr. MEDINA. Shall I proceed, your Honor?

The COURT. Yes, Mr. Medina.

Mr. MEDINA. Anthony Cramer.

ANTHONY CRAMER, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. MEDINA:

Q. You are the defendant in this case, Mr. Cramer?—A. Yes, sir.

Q. Where were you born?—A. In Ollendorf, Westphalia, in Germany.

Q. What sort of a place is Ollendorf, do you remember?—A. Oh, yes; a small town surrounded by mountains; a country and rural town.

Q. And is it a large place with many people, or haven't you

any idea as to about what the population was?—A. It is a town of about eight or nine hundred inhabitants.

Q. And when you say it is rural, you mean it is a farming community?—A. That is correct: yes, sir.

428 Q. I understand that October 5, 1900, was your birthday. Am I right about that?—A. That is right: yes.

Q. Now, what did your family consist of when you were young and living there as a boy in Ollendorf?—A. Well, I had eight brothers and one sister, and my parents died at the age of 72—my mother at the age of 68 and my father died in 1922, and my mother——

Q. Now you are going a little fast for me. I just asked you what family there was there when you were young, and you have gone a little further than that, but I just want to take it step by step. Now you had your father there, and your mother, too, when you were a boy, didn't you?—A. That is right: yes.

Q. How many brothers did you say you had?—A. Seven brothers and one sister.

Q. Seven brothers and one sister?—A. That is right: yes, sir.

Q. Now I take it that during all your youth there in Ollendorf you lived at home with your father and mother and your brothers and your sister?—A. Yes, sir.

Q. That is when you were a young boy?—A. Yes, sir.

Q. Do you remember that?—A. Yes, I do.

Q. Now were you brought up in any religious faith?—A. Hmm-hmm: in the Catholic religion.

Q. And that was when you were a boy?—A. That is right.

429 Q. And have you professed that religion and practiced its precepts ever since?—A. I have, yes, sir: ever since.

Q. Do you recall what education you had there in Ollendorf?—A. Well, I went to the elementary school and when I was fifteen I left my town—do you want to know that, sir?

Q. I just want to take it step by step and I want you to just relax and listen to me and answer the questions without trying to tell more than I ask you at the moment. I say you went to school there, and what school did you go to?—A. Well, that is what we call an elementary school.

Q. And that took you up until you were about twelve or thirteen?—A. Fifteen years of age.

Q. And after you left the elementary school in Ollendorf, did you go to another school?—A. Yes, I did.

Q. And what school was that?—A. That was in Muenster, Westphalia. That was a school for forestry economy and agriculture.

Q. And you were there in that forestry school for how long?—A. For about three years.

Q. When you got through with that forestry school how old were you?—A. I was about 18 then.

Q. About 18?—A. Not quite eighteen.

Q. You remember very well your eighteenth birthday, don't you?—A. Yes, I do.

Q. And that was October 5, 1918?—A. That is correct.

430 Q. So you were not in any forestry school then, were you?—A. Not then; no.

Q. So that if I may guide you a little, you must have been about 17 when you got through with this forestry school?—A. That is correct; not quite eighteen.

Q. What did you do when at the age 17 you just finished your education?—A. Well, I went back home to my father's farm and stayed there for about half a year and then I was called in for military service.

Q. We will come to that in a moment. Now you are back after you left school at your father's farm?—A. That is correct.

Q. What sort of a place was that; a substantial farm or just a dittle bit of a farm, or what?—A. Well, it was a farm of about 45 acres.

Q. And what sort of work did you do there when you got back from school?—A. Well, I helped my father till the soil and bring in the harvest.

Q. Did the ordinary things that a boy would do around that farm there?—A. That is right; that is correct.

Q. Now that was some time around the latter part of 1917 or the early part of 1918, wasn't it?—A. Hmm-hmm. That is correct, sir.

Q. Were conditions getting pretty bad there in Germany then?—A. Yes; very bad; the food was getting scarce.

431 Q. When the time came for you to go in the army, what happened then?—A. Hmm—well, I was called November 1st, 1918, and I was sent to West Baden, which is the southwestern part of Germany.

Q. Let me ask you about that: I have a little note here that you were first drafted or asked to go into the army in August 1918. Am I right about that?—A. That is correct.

Q. I wish you would explain the thing to the jury in your own way, all this business about your being called into the army, and what happened?—A. Hmm-hmm. I was drafted in July 1918 and I was reclaimed on account of the farm and because I had five brothers in the army.

Q. I don't think perhaps the jury know what you mean by reclaimed. You mean somebody asked that instead of going in the army you be sent back home for a while?—A. Well, my father was all by himself on the farm, and he could not do the work alone, so

a written statement was sent to the authorities to have me stay on the farm with my father until the harvest was brought in.

432 Q. It did not have anything to do with the fact that you were not yet 18?—A. No; I believe not.

Q. Did they draft people into the German army there even when they were younger than 18?—A. Yes; I was 17 when I was drafted.

Q. After they let you go back home to help your father on the farm in the summer of 1918, did there come a time when you were called back to the army again?—A. Yes.

Q. When was that?—A. November 1, 1918.

J. Just tell very briefly to the jury what your experience in the Germany army was. A. Well, I was sent to Wiesbaden, and we started drilling for about seven or eight days, and I took sick, I had the "flu" then, and I was brought to a hospital, stayed there for about eight days to recover, and by that time the revolution had broken out and I was sent back home, which was November 21, 1918.

Q. And the war was over, too?—A. The war was over then; yes, sir.

Q. After the war was over and you were discharged from the German army as you have stated, what did you do then?—A. Well I went back home again and stayed on my father's farm for another half a year, and then I went to Hamburg.

433 Q. Then you worked there at the farm for about a year, you say?—A. No; not quite a year.

Q. Not quite a year, then you went to some other kind of employment. What was that?—A. I went to Hamburg to Blom & Voss.

Q. To B-l-o-m and V-o-s-s?—A. That is right.

Q. How did you happen to go there?—A. Well, I had an uncle in Hamburg. He was working with the company.

Q. And somebody suggested——A. Yes.

Q. That you might do well in the shipyard?—A. I wrote a letter to him, and he said yes, to come.

Q. Did you work there very long?—A. Yes, for about three years I stayed there.

Q. And what sort of work did you do there?—A. Well, flange turning we would call it.

Q. You were there as a flange turner?—A. Yes, that is correct.

Q. Was that your first experience in iron work of any kind?—A. Yes; it was.

Q. After you had been working there for some little time did you plan to do something different?—A. Well, yes; I directed my attention to America.

Q. Well, how did that come about?—A. My oldest brother's sister-in-law, she had emigrated to this country and she wrote letters which I happened to read, and she liked it very much in this country——

Q. Is that lady you refer to Elizabeth Maria Schildmeyer?—A. That is correct.

Q. That was the sister-in-law of your oldest brother?—A. That is correct.

Q. You say you saw her letters that she wrote back from the United States?—A. Yes, sir.

Q. What was the general tenor of these letters that you read?—A. Well that this country was very much to her liking, and that there were possibilities, and the food was very much lauded and the conditions in general very much praised.

Q. Now what were the conditions in Germany at the time you looked at these letters?—A. Oh, they were chaotic at that time. We had an inflation in Germany and food was still very scarce.

Q. And did it seem to you a pretty hard place for a young man to get along?—A. Yes, it did, certainly; very much.

Q. After you read those letters did you decide that you would come to the United States if you could?—A. Yes, I decided to go eventually to the United States.

Q. What did you do to bring that about?—A. First I wrote a letter to this young Mrs. Schildmeyer suggesting my idea
435 that I should like to come to the United States, and she encouraged me in my intentions and said I should go ahead if I could.

Q. How did you get the money to come here?—A. Well, she knew a farmer, a very good friend of theirs, a Mr. Kuemmer, and he forwarded the money to me, or better—to a ship's company, to an English shipping company, the Royal Mail Steam Packet Line, and they provided me with a ticket.

Q. Were your parents and your family people of very modest circumstances over in Germany?—A. Well, yes.

Q. You could not turn to them for the money that was necessary to come over here, could you?—A. No; they could not afford it.

Mr. Murray. May I have those exhibits that I referred to, the ship manifests? I think Exhibit 37 is the first.

(Exhibits handed to Mr. Medina by Mr. Corrigan.)

Q. The time that you are referring to in your present testimony is some time in 1925, is it not?—A. Yes; that is correct. Of course I forgot to mention that I had been working with a printing outfit in my home town for two years, which brings us up to the time of 1925.

Q. Well, now that confuses me a little; I want to get the time straight here. When you got out of the army and worked

436 on the farm for a little while, didn't you?—A. Not on——

Q. Follow me along and we will get to the mining.—A. That is correct.

Q. First you went back to your father's farm?—A. Yes.

Q. And after that you went to the shipyards in Hamburg?—A. Yes.

Q. Was it after that you worked in the mine?—A. Yes; in my home town, Ollendorf.

Q. That is what you forgot to mention?—A. Yes.

Q. So you probably told the jury you worked in the shipyards a little longer than you really did work there?—A. About three years.

Q. So that if we start with 1918 and we take a year on the farm, that is 1919, and we add three years in the shipyard that is 1922—A. That is right.

Q. And a couple of years working in the mine brings you almost up to 1925, doesn't it?—A. That is correct; yes, sir.

Q. So you make that correction in what you stated before?—A. Yes, sir.

Q. Now before I get into these entries on this ship manifest, let me ask you this: When you decided you were going to come here to America after you had this correspondence with

437 Mrs. Schildmeyer, did you decide you were going to come here for good?—A. Yes, sir.

Q. And why did you do that?—A. Well the conditions in Germany were such that I disliked them very much, and I didn't see any future in Germany.

Q. So that way back in 1925 you made up your mind that you were leaving Germany for good?—A. That is correct; yes.

Q. I notice here in this ship manifest Government's Exhibit 37 that there are questions that were put to you way back there in 1925 on that same subject. For instance it says here "Whether alien intends to return to country whence he came after engaging temporarily in laboring pursuits in the United States?" And you answered that question "No," didn't you? In other words that you did not intend to return.—A. That is right.

Q. After pursuing a temporary employment.—A. Yes, sir.

Q. They ask again also in column 20, "Length of time alien intends to remain in the United States", and you answered that with the word "Permanent", didn't you?—A. I did; yes, sir.

Q. Thus indicating right at this ship manifest in 1925 that you intended to remain here permanently?—A. Yes, sir.

Q. Now a third question also in that column 20 says, "Whether alien intends to become a citizen of the United

438 States", and you answered that question "Yes," did you not?—A. I did; yes, sir.

Mr. MEDINA. I do not think, your Honor, it is necessary for me to show this to the jury. They may take my word for it that those questions and answers appear right in that exhibit.

Q. Now I observe here that there is in this ship manifest another question, "Whether in possession of $50 and if less how much?" And in the column referring to you it has got down $25. Is it a fact that when you got here to the United States you did not even have $50?—A. Well, I do not recall that fact. It is most likely that would be the thing.

Q. If it says here that you did not have $50 and all you had was $25, that is likely to be right?—A. It is; yes.

Q. As far as you remember?—A. As far as I remember; yes, sir.

Q. Now I notice also that they ask you here in column 19, "Whether going to join a relative or friend, and if so what relative or friend, and his name and complete address", and you apparently answered that "Friend, Frank Kuennen, Waucoma, Iowa, R. F. 3, St. Lucas." Do you remember that?—A. That is correct. Yes, I do remember that.

439 Q. Is that the same Mr. Kuennen that advanced the money to you?—A. He is; yes sir.

Q. He is the man that was helping you to come over?—A. Correct; yes, sir.

Q. Where is that St. Lucas; is that out in Iowa?—A. It is; yes.

Q. Do you remember who lived there?—A. Well, Mrs. Schildmeyer.

Q. Mrs. Schildmeyer lived there, did she?—A. Yes, sir.

Q. And this Mr. Kuennen was a farmer who was a friend of Mrs. Schildmeyer?—A. That is correct; yes, sir.

Q. When you got here and arrived in New York as shown by this manifest did you go right out to Iowa?—A. Yes, I did.

Q. And when you got out there did you look up this man Kuennen right away and go to work for him?—A. Immediately; yes, sir.

Q. And what sort of work did you do there?—A. Well, I would call it general farm work, doing chores and helping the outdoor works.

440 Q. As a matter of fact, without putting on any airs, you described yourself as a laborer, didn't you?—A. That is correct; that is what I did.

Q. And the work that you did out there was the common labor that a man does with his hands?—A. Yes, sir.

Q. How long did you work there for Mr. Kuennen?—A. For about two years.

Q. And just the same kind of work that you told us about?—A. Yes, sir.

Q. And did you work on any other farm out there?—A. For a short time I worked for Mr. Gerlemann.

Q. That is spelled G-e-r-l-e-m-a-n-n?—A. That is correct; yes, sir.

Q. After that, that brings you down to about what, 1927 or 1928?—A. 1927? At the end of 1927—yes, sir.

Q. This was just before you went to Chicago, wasn't it?—A. Yes, sir.

Q. And do you remember about what year it was that you went to Chicago?—A. Yes, that was 1927, in November or December; I am not quite sure about that.

Q. What got you to go to Chicago?—A. Well, I wanted to see the country and find work in Chicago, get acquainted what America was, and improve my conditions by finding better employment.

441 Q. You thought you might get something in Chicago that was a little better than this work you had been doing on a farm?—A. That is correct; yes, sir.

Q. You had not been earning very much on that farm, had you?—A. No, sir.

Q. And when you got to Chicago what did you do there by way of your employment?—A. Well, the first time, the first thing, rather, I went to the Kolping House in Chicago and through acquaintances I found employment with a manufacturer—a contractor, rather, Brown was his name.

Q. And what sort of work did you do there for this man Brown in Chicago?—A. I worked on his buildings as a laborer.

Q. As a laborer in the buildings?—A. That is correct; yes, sir.

Q. And then after that did you take up some other kind of work, still in Chicago?—A. Yes, I got a better kind of job with the Great Lakes Dredging Company in Winnetka, which is not very far from Chicago.

Q. And what were you doing with that Great Lakes Dredging Company?—A. We were building piers. I was working as a blacksmith.

Q. Working as a blacksmith there?—A. Yes, sir.

MEDINA. May I have the citizenship papers, please.

(Same handed to counsel.)

Q. Now you had had a little experience as an ironworker there in Hamburg, hadn't you?—A. That is correct, sir.

442 Q. So you were fitted to go into that sort of work you were doing there in Chicago?—A. Yes, sir.

Q. I notice in this exhibit, which is Government's Exhibit 1, here, that in 1928 you made a declaration of your intention to become an American citizen?—A. That is correct.

Q. Do you remember that?—A. I do remember that, yes.

Q. Do you remember doing that in Chicago?—A. Yes, sir.

Q. How did you happen to do that in Chicago?—A. Well, the facilities were very close at hand.

Q. That is, while you were out on the farm you did not have much chance to make a formal declaration that you wanted to be a citizen?—A. That is correct.

Q. When you got to Chicago, there was an opportunity to do it?—A. Yes, sir.

Q. And that was the first opportunity you had, wasn't it?—A. That is correct.

Mr. MEDINA. Now, with your Honor's permission, and you may recall when the exhibits were offered, I asked your Honor——

Mr. CORREA. No objection.

Mr. MEDINA (continuing). Whether I should read parts then or wait until our case, and you indicated to wait until our case, so I should like to read part of this now with your Honor's permission.

443 The COURT. Go ahead.

Mr. MEDINA. You gentlemen will remember that this copy of the citizenship papers was produced by the lady who was the clerk there, and one of the papers is this declaration and it says [reading]: "I, Anton Cramer" and so forth.

Q. By the way, Mr. Cramer, some of the papers here say "Anton" and yet your name is given here as Anthony. How about that?—A. Well, I changed that later on as Anthony. I liked that better.

Q. You liked Anthony better than Anton?—A. Yes, sir.

Q. Is it really about the same name?—A. It is the same name, only in English we say Anthony.

Q. Well, I would not call that a change myself. In German it is Anton and in English it is Anthony.—A. That is correct; yes, sir.

(Mr. Medina continues reading.)

Mr. MEDINA. I notice it says here "I was born in Arobahr, Germany." I think that is a little misprint.

Q. How about that?—A. It is Ollendorf.

Q. We might as well clear that up. I don't think it is Ollendorf at all. There is another manifest that gives us a little clue here. There are two Cramers on this page and that is what fooled me for a moment. In this first manifest you have

444 down here under the question: "Name and complete address of nearest relative or friend in country whence alien came," and you have written here "Mother, Maria Cramer, Ollendorf," and then it reads "Krs." and "Arnsberg."—A. Oh, that is the provisional town.

Q. In other words, if you said "Olhendorf, in the County of Arnsberg," that would be about what it meant?—A. That is right.

Q. So that Arnsberg is the subdivision or county in which the little town of Olhendorf is situated?—A. That is right; yes, sir.

Q. Can you tell us from that that this wording here, "I was born in Arobahr, Germany," is a misprint for this county of Arnsberg I have just referred to?—A. Hmh-hmm, most likely that is what it is.

Mr. MEDINA. I will continue the reading [reads]:

Q. Now, Mr. Cramer, when you signed the paper containing that statement in it, did you sincerely and honestly mean to renounce any allegiance to the German Reich?—A. Yes, sir.

Q. Back in 1928?—A. I did; yes, sir.

Mr. MEDINA. I continue the reading [reads]:

Q. Now did you mean everything you put in that statement, Mr. Cramer?—A. Yes, sir; I did.

Q. There was not any war on then, was there?—A. No, not that I recall.

445 Q. That is 1928. Now we have got down to the place where you were working for that Great Lakes Dredging Company, and I ask you what you did after that?—A. After that I went to South Bend—Hammond—to South Bend.

Q. To South Bend, Indiana?—A. To the Studebaker Company.

Q. Indiana?—A. Correct.

Q. The time you went to the Studebaker Company in South Bend was about when, 1928 or 1929?—A. In December, 1928.

Q. 1928?—A. That is right.

Q. Just about the good old days before the depression came on?—A. That is correct; yes, sir.

Q. And I suppose there was plenty of work out there at South Bend, wasn't there?—A. Yes, there was.

Q. How long did you work out there in South Bend for the Studebaker Company?—A. Well, it was a rather short period; for about six weeks.

Q. And then you found a chance to get other work that you felt might be better?—A. Yes, sir; Detroit looked very attractive to me and I went to Detroit.

Q. This brings us to 1929, doesn't it?—A. That is right.

Q. Detroit looked attractive to you, so you left the Stude-
446 baker Company at South Bend and went to Detroit?—A. That is correct; yes, sir.

Q. What had you been doing for the Studebaker Company?—A. I worked as a die fitter.

Q. Die fitter?—A. Yes, fitter; which is ironwork, rather rough ironwork.

Q. Were you all this time accumulating experience in different kinds of ironwork?—A. Yes, I was.

Q. And when you went to Detroit, what did you do there?—A. Well, I went into the same line as die fitter again.

Q. And did you work for some of the automobile companies in Detroit?—A. Yes, sir; for the Dodge Brothers, automobile manufacturers.

Q. Did you just work for the Dodge, or some of the other companies there?—A. Yes, and after I worked there for about half a year I worked for Briggs Manufacturing Company.

Q. Yes, and I have a little note here about Chrysler. You worked for Chrysler, too, at or about that time, didn't you?—A. Yes. After I worked for Briggs I worked for Chrysler.

Q. How did you happen to go from Dodge to Briggs and from Briggs to Chrysler?—A. The die making season is very short, you know. They usually work three or four months or five months in the year, and so it happens that the different companies
447 have different kinds of work; that is, for two or three months you can work for Dodge and then you may go to Chrysler or some other company.

Q. It has nothing to do with anything wrong you did in any of those places?—A. No, sir.

Q. That brings us, I suppose, pretty close to the time that we all remember in the Fall of 1929, doesn't it?—A. It does, yes.

Q. When the depression hit, what happened to you?—A. Well, as a die fitter and die maker I got laid off. There was no more work to do.

Q. No more work out in Detroit?—A. No.

Q. Then what did you do?—A. So I went to New York City. I thought I might get employment here.

Q. When you came here, what kind of employment did you get?—A. Well, the iron branch was completely dead, so I got work with a painting contractor as a painter's helper.

Q. Isn't it a fact that you went around from one little thing to another, trying to eke out a living here in those days?—A. That is correct, yes, sir.

Q. Doing a little painting here and a little handy man job there, and things of that kind?—A. That is correct.

Q. How long did that keep up?—A. Until 1933.

Q. Until 1933?—A. Yes, sir.

Q. Now that is quite a time, so I think I had better
448 go back and clarify it a little. Can you tell the jury a little more particularly just what these jobs were that you had in that period from 1929 to 1933 or 1934?—A. Yes, sir. I worked

as a die maker and die fitter in Detroit and from there went to New York in 1930. A friend of mine, by the way, had left Detroit and was in New York, and he wrote me to come down here and being here I found that the iron branches were completely dead, you know. There was no more work to be had, at least not for me, so I did some painting, started painting, and got into the painting branch, and did that for about two years and a half.

Q. That is this painting around in apartment houses and things of that kind, lasted as long as two or three years?—A. Yes, sir.

Q. And while I am coming back to Mr. Werner Thiel, isn't it the fact that you met him while you were out in Detroit?—A. I did. I met Thiel in 1929 in Detroit.

Q. That is the first time you ever laid eyes on him?—A. That is correct; yes, sir.

Q. So that I will go on about your employment and we will come back to Mr. Thiel in a few moments: when you got through this sort of work of painting buildings and handy jobs and things of that kind, where did you go then?—A. Well, then I went to Hammond, Indiana.

449 Q. How did you happen to go out there?—A. I had a friend in Hammond who worked as an engineer in a hospital——

Q. When you say an engineer in a hospital, I wish you would try to explain to the jury what that means, because I have a different idea of an engineer I think from you.—A. Well, this is the so-called stationary kind of engineer, the kind of engineer who is the equivalent of a building superintendent, I would call it.

Q. A man working down in the boiler room?—A. In the boiler room, yes.

Q. In the hospital?—A. That is correct, taking care of the boiler room. And he wrote me that he had a good job for me, and a steady job, too, so I did not hesitate very long. I accepted the offer and went to Hammond, Indiana, in 1933, in July I believe it was.

Q. When you say you did not hesitate very long, you mean in effect that you were mighty glad to have a chance and snapped at it, didn't you?—A. That is correct; yes, sir.

Q. When you got out there what kind of a job did you get?—A. Well, I helped as a mechanic and a fireman, both things together.

Q. Had you ever done any work of that kind before?—A. No, not in that particular line.

Q. Well, you have not left anything out in telling
449A the jury of these various things you did, have you?—A. No, sir.

Q. So this was the first time you ever did any work of that kind?—A. That is correct; yes, sir.

Q. And that was in a hospital there in Hammond, Indiana?—A. In the hospital, Hammond, Indiana; yes, sir.

Q. What was the name of that hospital?—A. St. Margaret's Hospital.

450 Q. Did you stay there long?—A. Yes, I stayed there for three years.

Q. And where did you live?—A. I lived right in the hospital; in St. Margaret's Hospital.

Q. You had a little room right in the hospital there?—A. That is correct; yes, sir.

Q. You did not have to pay anything?—A. No, sir.

Q. For renting any room to live in. You got that free, didn't you?—A. That is correct; yes, sir.

Q. Now do you recall when it was that you left your employment in that hospital?—A. In June 1936.

Q. You had a pretty good job out there, didn't you?—A. Yes.

Q. How much were you making?—A. I made $75 and everything free, a month.

Q. $75 a month?—A. Yes.

Q. That was a pretty good job for you, wasn't it?—A. Well, it was.

Q. Well, whatever got you out of there?—A. Well, I wanted to see my folks back home in Germany, so I went back to Germany in 1936.

Q. I know, but before you got back to Germany to see your folks you had something to do with a delicatessen business down in Florida, don't you remember that?—A. No, that was later on, sir.

451 Q. Oh, that was later on after you got back from your visit abroad?—A. Yes, sir.

Q. So after you had been there in St. Margaret's Hospital for three years or so was when you wanted to go back home, and you did go back home?—A. Yes.

Q. And when you got back to Germany—and I will come back to that, because I am going over your various jobs—the next job you had of employment after the hospital was what?—A. It was in a delicatessen store in Florida.

Q. Well how did you happen to get into that?—A. I had an acquaintance who happened to be in Fort Myers, and he wrote to me that he could use a partner.

Q. Do you remember the name of that acquaintance?—A. Yes, sir: Hubert Thielmann.

Q. That is the man that you wrote one of these letters to?—A. That is correct.

Q. That was put in evidence here the other day: isn't it?—A. Yes, sir.

Q. The man you were asking about the money that he owed you?—A. Yes.

Q. That was the same Hubert Thielmann, wasn't it?—A. The same person: yes, sir.

Q. When he wrote to you what did he say about wanting a partner?—A. Well, he said that during the season in
452 the wintertime there would be a good chance for me to make money and to get acquainted with a new kind of business.

Q. Did he say anything about putting any money in?—A. Yes, sir.

Q. Had you been able to save a little money by this time?—A. I had saved about $600 and—

Q. And did he say anything about, or did someone else suggest, having another partner besides you?—A. Well, at that time Werner Thiel was with me in the St. Margaret's Hospital and he suggested that perhaps there could be two partners used and that I should write to Thielmann if he could come along, and I did so.

Q. He wanted to get in on that?—A. Yes.

Q. It looked like a pretty good proposition?—A. That is right.

Q. Was the upshot of this that you and Werner Thiel went down to this place where Hubert Thielmann had the delicatessen store?—A. Yes, sir.

Q. And did he get you and Werner Thiel both to put up some money?—A. He did: yes sir.

Q. Tell the jury about that.—A. Well, he wrote us that he needed about $700. So Thiel being anxious to get in on it, he said that he had a little money and that he would put up
453 $150 and I should put up the rest, which was about altogether about $520 I believe. So we went down there and gave this money to Thielmann and started in business.

Q. That is $350 from you and $150 from Werner Thiel?—A. That is correct.

Q. You were kind of happy about that, weren't you?—A. Yes: it looked like a good proposition.

Q. And what happened when you got down there?—A. Well, the business looked very discouraging.

Q. Well, isn't it a fact that you lost the money and the thing broke up, and you had to come back?—A. That is correct.

Q. Wiser and sorrier?—A. That is right. We did: yes, sir.

Q. Did Thielmann at that time acknowledge that he owed you that money?—A. Yes: he did.

Q. So that later on you got some evidence of that indebtedness from him, didn't you?—A. I did: yes.

Q. A note or something of that kind?—A. Yes, sir.

Q. Now that brings you back here about when?—A. To May 1937.

Q. So you got back from your trip to Germany and then you went down with Werner Thiel to this delicatessen venture in the latter part of 1936, and you are back in New York again in '37?—A. That is correct; yes, sir.

454 Q. What did you do then?—A. Well, I secured employment with the Pepsi-Cola Company, being in New York.

Q. What were you supposed to do there?—A. As a maintenance man.

Q. Working in the boiler room?—A. No; this was painting over the building and looking over things so nothing would be destroyed, or rather, you know, keeping the thing in trim, the building.

Q. As a matter of fact over all these years did you have any substantial periods of unemployment?—A. No, sir.

Q. You had a job of one kind or another all this time?—A. I had; yes, sir.

Q. When you worked as a maintenance man there with the Pepsi-Cola people in 1937 did you feel satisfied with that?—A. Well, yes; it was a pretty good job.

Q. What did you leave it for?—A. Well, I got dismissed there because they were moving to a new factory and there was no longer work for us.

Q. So you were out of a job again?—A. That is correct.

Q. Due to no fault of your own?—A. No.

Q. What did you do then?—A. Well, then I worked as a salesman for the Century Metal Company selling Silver Seal.

Q. But you had not had any experience as a salesman, had you?—A. No; but I tried.

455 Q. Well how did you get into that?—A. Through the Times. There was an ad in the Times, they were looking for salesmen, and that anyone could do it if he applied his energies hard enough.

Q. Oh, they said in the ad you did not have to know anything about it, just come around?—A. Something to that kind; yes.

Q. Well, what kind of stuff were you going to sell?—A. Well, they were kitchen utensils, pots and pans.

Q. Do you remember the name?—A. Yes; the Century Metal Company.

Q. No; but the name of this kitchenware you were going to go around and sell?—A. Yes; Silver Seal.

Q. Silver Seal, a sort of patented name.—A. That is correct.

Q. That sounded pretty good to you?—A. Well, it sounded pretty good; yes.

Q. In any event you answered the ad and you started now being a salesman?—A. That is correct.

Q. What happened to that?—A. Well, it was rather difficult to make a somewhat decent living and I——

Q. Yes; you might have known that before you went into it, mightn't you?—A. I should have, but I didn't.

Q. How long did it take you to find out that you could
456 not make a living selling Silver Seal kitchenware?—A. Well, I tried for about three months and then I quit it.

Q. What did you do then?—A. By that time I got a job with the Modern Art Craft Company. They were working for the World's Fair.

Q. The World's Fair was going up and it was another temporary sort of thing there; is that correct?—A. That is right; yes.

Q. You knew when you went into it, it was not going to last any long time, didn't you?—A. I knew that; yes.

Q. Why did you take that job?—A. Well, my money was getting low and I had to take it.

Q. You had to take it, you did not have any option, did you?—A. That is correct.

Q. How long did you work there in the World's Fair?—A. I would say about a year.

Q. That brings us to about when?—A. To 1939.

Q. To 1939?—A. Yes, sir.

Q. And when the work at the World's Fair was over you were looking around for another job, weren't you?—A. Yes; by that time I had applied for my engineer's license, you know, to work in a boiler room.

Q. Tell the jury what you had been doing about that over this
457 period of years that had been elapsing.—A. Well, in Hammond, Indiana, I started studying steam and electricity in order to be able to work myself up, and in Indiana I had secured the engineer's license and——

Q. How do you mean, you worked for that? Did you go to classes, or did you study home?—A. I studied home. I had books.

Q. Down in your room at the St. Margaret's Hospital?—A. That is correct.

Q. You had these books, and studied them so you could a license as a stationary engineer?—A. That is correct; yes, sir.

Q. And you did get that out there in Hammond, Indiana?—A. Yes, sir.

Q. What else did you do later to get a similar license here in New York?—A. Well, I studied. I kept on studying and applied to the City Hall, that I wanted to take the examination as an

engineer, and finally I got called down and got my engineer's license, and by that time——

Q. Was it in connection with that work that you had this drafting board that has been described by some of the witnesses, that was in your room?—A. Well, yes. You know that, of course, is another thing for a mechanical engineer. I wanted to become a mechanical engineer.

Q. Oh, you wanted to become a mechanical engineer?—A. That is correct.

Q. In addition to a stationary engineer?—A. That is
458 correct.

Q. Tell the jury how you went about that sort of work here, because I don't understand about it and I wish you would tell us.—A. Well, as I said, I studied and finally succeeded to get my license.

Q. How would you know where to get the books and how would you know how to go at it?—A. Oh, I bought a couple of books, you know, appertaining to this very subject of becoming a mechanical engineer, and they gave you further hints how to advance and how to gradually come to the point.

Q. So you would be up there in your room studying these books after you performed your regular work?—A. That is correct.

Q. How long did you have to do that work and plod along before you were able to get the certificate in New York?—A. Well, I had been at it for about five years.

Q. Five years?—A. Yes, sir.

Q. The fact that you had a certificate from Hammond, Indiana, did not do you much good here, did it?—A. No; I had to study it all over again.

Q. You had to do it all over again?—A. Yes, sir.

Q. That brings us down to 1939, when the work was over at the World's Fair, and what employment did you go into then?—A. Then I got a job with the Peck Memorial
459 Hospital as an engineer.

Q. Down in the boiler room?—A. Yes, sir.

Q. How long did that last?—A. That lasted for about six weeks, and meanwhile I had joined an organization of steam engineers, the National Association of Power Engineers, and through acquaintances I got a different, a better job with the National Licorice Company.

Q. The National Licorice Company?—A. That is correct.

Q. What was the nature of your job with the National Licorice Company?—A. Taking care of the boilers and of the machinery in the engine-room.

Q. How long did you work there?—A. I worked there for somewhat more than two years.

Q. That is from the time you left the Peck Memorial Hospital until the time you were arrested in this matter that is now being tried?—A. That is correct; yes, sir.

Q. And how much a week were you making in the job with the National Licorice Company?—A. $45.

Q. Just beginning to get along, were you?—A. Yes, sir.

Q. After all these years of plugging.—A. Hm-hm. Yes, sir.

Q. Now go back over all these jobs that you told about. Was there ever a time when you were discharged for any wrongful conduct on your part?—A. No, sir.

Q. Was there ever any time when you were discharged
460 for incompetence, insolence or anything that you had done wrong yourself?—A. No; I was not.

Q. Never once in all these years?—A. Never.

Q. Is it a fact that in going from job to job in the way you did, the circumstances that led you to leave one job and go to another were entirely beyond your own personal control?—A. Well, yes; sometimes they were and at other times I was urged to take another job to learn, to get more experience.

Q. But never in any of the times that you went from one to another was there any relation to any wrongful conduct on your part whatever?—A. No, sir; never.

Q. Now was there a time some time in 1941 when you made some other effort to perhaps earn more money?—A. Yes; there was.

Q. What was that?—A. I tried to get employment with the Navy Yard.

Q. Did you apply there for some particular kind of a position?—A. Yes, sir; I did.

Q. And what was that?—A. A shipwright.

Q. What was the upshot of that application?—A. Well, I was called in an examined, and finally when I was hired and I found out that a shipwright is a woodworker, in which line I have no experience at all, so I did not take the job.

Q. That is, you were experienced in iron work?—A. Yes;
461 Q. When you say you were examined, where did the examination take place?—A. In the Navy Yard.

Q. Was that the only occasion that you were ever in the—A. Yes; it was.

Q. Did you go there and undertake any employment, actually work there, ever?—A. No; I never did.

Q. So that when you found that the shipwright business was wood working instead of the metal working that you speak of, did you ultimately abandon the thought of going there?—A. No; I wrote a letter immediately the next day to the manager of the employment office, that there was a mistake, that I thought that a shipwright was an iron worker.

Mr. CORREA. May the date of this be fixed, counselor?

Mr. MEDINA. Well, I can only tell by that paper that you found up in the room there; that is my only——

Mr. CORREA. The witness could probably tell.

Mr. MEDINA. If I may have that little piece of paper or whatever it was.

Q. I have a paper here which I call to your attention, and you will notice that this paper has the date 1/9/42 on the top (handing to witness), because Mr. Correa asked me to help fix the date. Now do you recall what happened? Go right ahead with your
462 story. You were telling us about the letter that you wrote?—A. Well, I wrote a letter stating that there was a mistake involved and that I would apply as a flange turner, which was the thing that I could actually do, and I have not been receiving an answer to that letter.

Q. But you did in the course of time receive this communication that I have shown you?—A. That is correct.

Q. And you never did appear there or report for work or do anything of that kind?—A. No, sir.

The COURT. What was the date on which you applied for this job first, January 9th did you say?

The WITNESS. I believe it was in August 1941.

The COURT. In August 1941. What is the date 1/9/42?

Mr. MEDINA. This communication here, which is really of no moment in the case, except that it might make some confusion, and it does not indicate there was anything this witness did in 1942 at all.

The COURT. It was in August 1941.

Mr. MEDINA. That is right.

The COURT. He applied for the job in the United States Navy Yard?

The WITNESS. Yes, sir.

Mr. MEDINA. That is right.

By Mr. MEDINA:

Q. You have stated here that you met Werner Thiel in
463 Detroit in 1929. Do you remember that?—A. Yes, sir; I do.

Q. Was he of the same religion as yourself?—A. No; he was a Lutheran.

Q. Do you know where his family came from?—A. Yes; I do.

Q. Where was that?—A. In Dortmund.

Q. That is D-o-r-t-m-u-n-d?—A. That is right; yes, sir.

Q. Where was Dortmund?—A. Dortmund is a city in Westphalia, about 14 miles from my home town.

Q. About 14 miles from your home town in Germany?—A. 14, that is correct.

Q. Did he tell you anything about the circumstances of his family in Dortmund?—A. Yes; he did.

Q. What in substance did he say? I do not want too much detail, but just give a general statement of it.—A. His father is a building contractor, and he has about five or six brothers and a couple of sisters, and he comes from what I call a rather well-to-do family.

Q. A rather what?—A. Well-to-do family.

Q. A rather well-to-do family of Dortmund?—A. Yes.

Q. Certainly from what he told you their circumstances were far better than the circumstances of your father and mother?—A. Yes, sir.

Q. Did he tell you how long he had been there before you met him in Detroit?—A. Well, he had been in Detroit
464 a very short time. He came from I believe Flat Rock, Michigan, the Ford Oglethorpe Company there.

Q. Did you see very much of him when you first met him in Detroit?—A. Oh, yes; we did.

Q. How did you happen to meet him there; do you remember where you met him?—A. I do.

Q. Where was it?—A. It was in the Kolping House.

Q. Is this Kolping House you refer to again and again a sort of Catholic Y. M. C. A. for German people?—A. I might be classified like that.

Q. Well you have told me it was kind of a Y. M. C. A. didn't you?—A. Yes, sir.

Q. It has the same general idea behind it?—A. It has; yes, sir.

Q. You met him then at this Kolping House, and I wish you would describe to the jury what your relations with him were there in Detroit when you first knew him.—A. Well, at that time Thiel was a man of about 22 or 23 years old, a rather young fellow, and he looked a little lost at that time and so I took to him, we became friends, and we both knew how to play chess, you know, and that I believe strengthened our friendship a little at that time. We played chess together quite a bit.

Q. Did there come a time when you came to New York and he stayed at that time in Detroit?—A. Yes, sir. I
465 went to New York in 1930 and about three-quarters of a year later or ten months. I am not sure about that. Thiel also emerged in New York.

Q. Did you correspond with him in the interval?—A. No; not then.

Q. And when he came to New York where did you see him?—A. The first time I saw him in the Kolping House.

Q. At the Kolping House in New York?—A. That is correct.

Q. And at that time is when you were doing this painting in

these apartment houses that you have told about, isn't it?—A. That is correct; yes, sir.

Q. That was just about when this depression got going, in 1930, wasn't it?—A. Yes; it was.

Q. 1929, 1930, and 1931 is about that time. Well, after Thiel got here to New York did you see more of him then?—A. Yes.

Q. Or less, or what?—A. We saw each other a couple of times each week. He came to the Kolping House quite frequently, and at that time I lived in the Kolping House.

Q. You were living right there at the Kolping House, were you?—A. Yes, sir.

Q. Where was he living?—A. That I am not quite sure; some place in Yorkville. I don't know quite where it was.

Q. Do you know what he did for a living about that
466 time, 1930 and 1931?—A. Well, at one time he worked as a porter in the Jewish Infirmity Home, Old People's Home, rather, 105th Street, the West side.

Q. Perhaps it won't do any harm if I lead you a little bit here. Thiel was having a pretty tough time then, wasn't he?—A. Yes; he was.

Q. Doing jobs as handyman and porter, and whatever he could get?—A. Yes, sir.

Q. Did he have occasion then to borrow any money from you?—A. Yes; he did.

Q. I suppose you did not have very much in those days to lend him, did you?—A. No; I did not have much myself.

Q. Is it a fact that however the circumstances may have been that you did make small loans to him at about that time?—A. I did; yes, sir.

Q. Were those paid back to you later?—A. They were paid back; yes, sir.

Q. Was there anything that occurred at about this time that interested Thiel in something that perhaps you did not take the same interest in?—A. Well, yes; I believe there was. He got interested in the Friends of New Germany at that time in New York.

Mr. Cramer. May I ask what time?

Q. Now, in 1930 in New York City we are talking about, in fact, around, we?—A. Yes, sir.

467 Q. We are not talking about 1934 or 1935 in Hammond, Indiana. We have not got to that yet.—A. Hmm-hmm.

Q. And so I say what was it that Thiel got interested in here, right here in New York, in about 1930, that you did not take the same interest in, if any? Did he get interested in these Nazis at about that time?—A. Well, yes; that is what I said. That was at the end of 1932 or 1933.

Q. Oh, as late as that?—A. Yes.

Q. Did he tell you that he went around to meetings and things of that kind or what did he tell you?—A. He spoke very little to me about it.

Q. But the fact is, you knew at that time that he was becoming interested in this Nazi business, didn't you?—A. Yes, sir.

Q. Now did you get interested in it in the same way?—A. No; I did not.

Q. Well, why not?—A. Well, I had other things to do and I never got acquainted with it anyway. I did not have interest in it.

Q. But he did?—A. He did; yes.

Q. I want to pursue that just a little bit further. As a matter of fact, didn't you have some discussions with Thiel on that subject back there in 1931, 1932, and 1933?—A. Oh, yes; we
468 were quite a bit discussing things and Thiel was more or less a man antagonistic to any kind of religion, I believe.

Q. Well, did you have any discussion about this Nazi business?—A. No; not that I recall. Very little, perhaps. I do not recall the other conversations. We talked quite a bit about history. I was very much interested in history.

Q. I have a little note here that you had some discussion about this and that he or you got very irritated. Do you remember anything about that?—A. Well, yes; he had—he was a man that could get irritated when he was opposed in his subject, in his particular views, particularly about national ideas.

Q. Now coming right out, tell the jury what you mean and don't give us any riddles about it.—A. He was the kind of man that I would say was very strongly attached to certain ideologies, and this was at that time of national socialism.

Q. Well, he was in favor of the national socialist doctrine, was he?—A. Yes; that is it.

Q. And that is Hitlerism?—A. Yes, sir.

Q. And what was it you said when you argued with him there, that he became irritated?—A. Well, as much as I do recall at that
time we had a discussion and I argued that it was never
469 worth, that the expansion of a nation was never worth a human life, and he said that it was worth—"You know that a couple of hundred thousand men could easily be sacrificed for the expansion or glory of a nation," and I was of contrary view.

Q. You did not like that sort of thing, and you were irritated by what he said, were you?—A. Yes, sir.

Q. During the time that you lived at the Kolping House, Thiel was living somewhere else, wasn't he, and you do not remember just where he was living?—A. No; I do not remember.

Q. It was in New York City, of course, wasn't it?—A. Yes, sir.

Q. Now when you went out to Indiana in response to this letter

that you told the jury about, did Thiel go out there too right away?—A. No, sir. He came later. I went to Indiana and he wrote letters to me that he should like to come to the West himself.

Q. Well, by that time you and Thiel were pretty good friends, weren't you?—A. Oh, yes; we were.

Q. And he wrote and you wrote and when you told him what a good place it was he wanted to come out too, didn't he?—A. That is correct; yes, sir.

Q. Well, did you try to help him get a job out there?—A. Well, I wrote him that there was a possibility right where I
470 worked for him to get a job, and he wrote back that he did not have the money to come, so I sent him money. I believe it was a hundred or one hundred and twenty-five at that time.

Q. You loaned him the money to come out there?—A. That is correct; yes, sir.

Q. And did he come out?—A. He did.

Q. Then you were living in this little room at the hospital, weren't you, in Hammond, Indiana?—A. That is correct.

Q. And where was he living?—A. He lived not very far from the hospital in a private home.

Q. He had a room in a private home, you say?—A. That is right; yes, sir.

Q. And did you see a good deal of him there in Hammond, Indiana?—A. Yes; we saw each other almost every evening.

Q. Spent your evenings together?—A. That is right; yes, sir.

Q. Now was it some time when you were in Hammond, Indiana, that both you and Thiel joined this Friends of New Germany there?—A. Yes, sir; it was.

Q. Why did you do that?—A. Well, I would say for social purposes. We thought that we could make a larger circle of acquaintances, and this was the thing made to get it.

471 Q. Who were the people who were in this Friends of New Germany out there in Hammond, Indiana?—A. Oh, they were middle class Germans who worked in factories.

Q. They were factory workers, were they not—A. That is correct; yes, sir.

Q. And that is the kind of people you and Thiel went around with, isn't it?—A. That is correct.

Q. Did they do any of this drilling with guns and uniforms on and all that sort of business?—A. No; I have never seen that.

Q. This is 1934 we are talking about, isn't it?—A. Yes; that is 1934.

Q. There was not any war going on then, was there?—A. No, sir.

Q. Did there come a time when you decided you did not want to stay in with the Friends of New Germany?—A. Yes, sir; in 1935 I resigned——

Q. What was it that led you to pull away from the organization?—A. Well, at that time there were quite a few things going on which I disliked; swindling; there was a money swindle that occurred in the Bund, or Friends of New Germany at that time.

Q. Now you heard the other day Mr. Willis, on the stand here, testify that you told him that you left the Friends of New
472 Germany because you did not like the marching around and these radical activities, didn't you?—A. Yes, sir.

Q. Didn't you tell him that?—A. I think I did; yes, sir.

Q. Tell the jury what you meant by that.—A. Well, I had heard at that time that they were wearing long boots and a particular design uniform, and all that, that they were doing in Chicago and New York quite a bit of marching, and I was opposed to that kind of thing and I thought that should never go beyond any social circles; any social activities, rather.

Q. As a matter of fact you were all this time working there to be a stationary engineer, weren't you?—A. Yes, I was.

Q. That is the very time you were working there to prepare yourself to take the examination?—A. Correct; yes, sir.

Q. In any event the fact is, is it not, that you ceased to belong to the Friends of New Germany some time in 1935?—A. That is correct; yes, sir.

Q. Is it also a fact that while you left the Friends of New Germany in 1934 or 1935, that Thiel continued with them?—A. Yes, sir.

Q. Did he continue to be a member of that organization during all the rest of the time that you and he were
473 out there in Hammond, Indiana?—A. Well, I do not recall the particulars about that, but he continued to be a member, and then came a time when he left Hammond, Indiana, for the West Coast.

Q. Now I am glancing at my notes here because this business of his leaving for the West Coast I do not seem to recall; or did he leave for the West Coast before you left Hammond, Indiana?—A. Yes, he did.

Q. Now you left Hammond, Indiana, to go back to Germany, didn't you?—A. That is correct.

Q. That is the time you went back to visit your family in 1936?—A. Yes, sir.

Q. So that you worked there in Hammond, Indiana, right up to the time that you left to go back to Germany for a visit?—A. That is right, sir.

Q. And it was before you left Hammond, was it, that Thiel went out to the West Coast?—A. It was; yes.

Q. And what did he go out there for?—A. He had been working with the Kellogg Construction Company, a job they were doing coming to an end, and he had made the acquaintanceship or friendship of a man named Charlie, who was a pump builder, and he, through this Charlie, got employment on the West Coast in a factory where they manufactured pumps.

Q. So when you got back from your visit to Germany
474 and this delicatessen business came up, Thiel had come back from the West Coast?—A. That is right; yes, sir.

Q. Now when we get down to around 1936, you began to give serious thought to your citizenship matter, didn't you?—A. Yes, sir.

Q. And did you think of that before or after you made this trip to Germany?—A. Well, I was resolved before that, that I would become a citizen of the United States.

Q. Well, you had resolved that as shown by these ship manifests the very time that you came over here in 1925, hadn't you?—A. Yes, sir.

Q. What was it that brought the thing to a head there in 1936?—A. Well, you require a certain length of time to be in one place, and I had never been able to get my citizenship papers because I never stayed long enough in one place.

Q. And then you had been so long there in Hammond, Indiana, that for the first time you complied with that requirement?—A. That is correct; yes, sir.

Q. Tell the jury about this trip that you made to Germany in 1936?—A. Well, I left our country in June 1936 and went to Germany to my parents; to my home town, rather.

Q. Went back to Ollendorf?—A. Went back to Ollendorf and stayed there for most of the time, and during my stay in Germany I went to Berlin for one week for the Olympic
475 Games, and then came back home again and stayed until the end of August and then went back to America.

Q. And when you came back you went back to Hammond, Indiana, of course?—A. That is correct; yes, sir.

Mr. MEDINA. With your Honor's indulgence, may I have a short recess, as I just want to glance at these manifests.

The COURT. Yes.

(Short recess.)

Q. One of the newspaper men suggested a question to me that I asked you in the beginning: when you came over from Germany, did you have any command of English at all?—A. Well, yes; I studied English in Germany.

Q. And were you able to converse in English when you first got here in 1925?—A. No, sir; I did not understand it.

Q. Had you studied it maybe for the equivalent of what we would call taking a year of English, or a year of some foreign language?—A. Yes; I would say about that.

Q. So that you had a smattering of English when you first came over?—A. I believe that is the right expression; yes.

Q. Now we get around to 1936: when you went back to see your family in Germany, had your English gotten pretty
476 good by that time?—A. Well, I would say fairly well.

Q. Were you constantly trying to improve it?—A. I was then; yes.

Q. As a matter of fact when they arrested you, you had a little booklet in your pocket entitled "How to improve your English," didn't you?—A. Yes, sir.

Q. You had it pretty nearly worn out studying it, too, didn't you?—A. I did; yes, sir.

Q. Now, taking these manifests of your trip to Germany, Exhibits 28 and 29, one referring to your trip over to Germany and the other referring to your trip back, is it not a fact that in each of those manifests you indicated that the United States was your permanent place of residence and that you had come over here to stay and intended to stay and intended to become a citizen?—A. Yes, sir.

Q. So that from the time you first came over here in 1925 when these original manifests were made out, right down to the time that you actually became a citizen, every time you were asked that question in any formal and official way, you answered that you intended to become a United States citizen?—A. I did; yes, sir.

Q. And that you came in the first place with that intent and at all times since intended to become a permanent resident of the United States of America?—A. Yes, sir.

477 Mr. MEDINA. I do not think, Your Honor, it is necessary for me to call the jury's attention to the particular questions and answers in these manifests as I am sure there is no dispute that the fact is as I have stated it.

Q. I think you said you went to see the Olympic Games for a time there when you made this trip in 1936?—A. I did, sir.

Q. Did you spend all the rest of your time with your family; your folks there in Ollendorf?—A. Yes, sir; I did.

Q. Now during that time that you were over there in Germany in 1936, did you have any conversations with any officials or representatives of the German government?—A. No, sir.

Q. Did you have any conversations with anybody directly or in-

directly, that had to do with your taking any task as an agent of the German government?—A. No, sir; never.

Q. Did anybody approach you on such subject—A. No, sir.

Q. While you were over there or at any other time?—A. No, never.

478 Q. Now, when you got back you told us you had this delicatessen venture, but I suppose first you went back to your job at St. Margaret's Hospital?—A. I did so; yes, sir.

Q. And it was after you worked there an additional few months that this fellow Thielmann got you to go down to Florida on this delicatessen venture?—A. That is correct; yes, sir.

Q. Now did you say that after that broke up and you lost your money that this Hubert Thielmann gave you a note?—A. Yes, he did.

Q. What did you do with that note?—A. As much as I recall, I kept it in my room.

Q. Now I have inquired of Mr. Willis, and all the papers that they took up in your room there and among them they do not appear to have found that note at all, nor do they appear to have found it in your wallet when they examined the contents of that. Can you imagine what became of it?—A. Well, the last time I have seen it was about, I would say, half a year a go, and it was in my brief case. It bore the heading "Promissory Note."

Q. What do you think happened to it?—A. Well, I don't know. I am quite sure it was in my brief case.

Q. Did you have any occasion to examine it or look at it in this interval of six months?—A. No; I do not think so. I am not quite sure about that.

479 Q. However the fact may be about the present whereabouts of that note, is it not the fact that this man Thielmann has acknowledged that he owned you the money?—A. Correct; yes.

Q. There is no doubt about that between you and Thielmann, is there?—A. No, sir.

Q. And isn't it a fact, too, that on the very day you went down to the Corn Exchange Bank you deposited a $80 check that Thielman had paid you on account of the indebtedness?—A. That is correct.

Mr. MEDINA. You have not found that note at all, have you, Mr. Willis?

Mr. WILLIS. The Thielmann note?

Mr. MEDINA. The Thielmann note.

Mr. WILLIS. No, sir.

Mr. MEDINA. And as far as you know, there was no such paper up in Mr. Cramer's room or in his wallet?

Mr. WILLIS. That is right.

Q. Now after that venture failed and you came back to New York, did Thiel come back with you?—A. Yes, he did.

Q. And where did you live then?—A. We moved to the Kolping House first; that is, I lived there for a short time and then went to St. Nicholas Avenue, a friend of ours, William Henke——

Q. H-e-n-k-e?—A. Yes, sir.

Q. You and Thiel went to live at Henke's?—A. Both of us lived at Henke's.

480 Q. What was that, a sort of rooming house?—A. It was a large apartment and since Henke and his wife did not need it all, they rented out two rooms to us; to Thiel and me.

Q. And did you stay there long; you and Thiel?—A. We stayed there for about four or five months, or even less. I am not quite sure about that. About two or three months. I could not tell.

Q. And that was up in St. Nicholas Avenue?—A. That is correct; yes.

Q. What was Thiel doing at that time?—A. Well, when we came back from Florida, Thiel got a job with the Sossner Brothers downtown, I believe, as a die maker, and from there he went to Philadelphia for a short time and worked as a die maker in Philadephia, but that did not last long, about five or six weeks, and he came back. His money soon gave out and I gave him some more money.

Q. When you say you gave him some more money, I don't know whether you mean to say that or not, or do you mean to say you loaned him some money?—A. That is correct. I loaned it to him.

Q. You did not give it to him, you loaned it to him?—A. That is correct; I loaned it to him.

Q. Can you fix the time for that?—A. The time I advanced money to Thiel was from 1937 to 1938.

481 Q. No. You are a little bit too broad. You say he came back from Philadelphia and he was pretty hard up?—A. After a few weeks; after he spent the little money that he had saved.

Q. But I am trying to get your mind fixed on the time he came back from Philadelphia and he was hard up. When was that?—A. That would be December of 1937.

Q. Of 1937?—A. Yes, sir.

Q. And that is when you loaned him some small sums from time to time?—A. I did.

Q. About the end of 1937 or beginning of 1938?—A. That is correct; yes.

Q. At that time did you enter those amounts in a little book or were those entries made later?—A. No. At the same time I

gave him the money, as I do recall, I made the entries into the book.

Mr. MEDINA. May I have that book, please, Mr. Willis [book handed to counsel]?

Q. I show you a little blue book and ask you if that is the book that you refer to?—A. Yes, sir; it is.

Q. Now you have opened this book to a certain page here, and I ask you did you make all those entries that appear on that page in pencil yourself?—A. Yes, sir; I did.

482 Q. And when did you put those entries down?—A. Every time I gave him the money.

Q. That is, you put the several entries in, one at a time, and at or about the date that appears there?—A. Yes, sir.

Q. Now don't say that is so if it is not, because I want you to get it right. Don't just follow me. You notice here the first entry with a date on it says "December" and then it apparently has an item of $16.10.—A. Hmm-hmm.

Q. Is there some way of telling that is December 1937?—A. It is December 1937.

Q. Is there some way of telling that?—A. Yes, sir.

Q. What is that way?—A. It says "1937."

Q. That is, you put here those numbers "1937"?—A. That is correct, sir.

Q. Did you put those down there at or about the time you made the entries?—A. Yes.

Q. As a matter of fact you had this book up in your room there, didn't you?—A. I did.

Q. So that when the FBI men went up there on the Sunday after you were arrested and took all your things downtown, among other things they brought this book?—A. No, not then; some weeks later.

Q. Some weeks later?—A. Yes.

483 Q. But as far as you know, it was some weeks later?—A. Yes.

Q. In any event, we get down here past December and I see an entry that says, "Jan.," with "1937" after it. Have you any explanation to make about that?—A. Well, yes; I think that was due to a mistake, which has happened to me quite often, that at the beginning of a new year I have dated the old year again.

Q. In other words, you made certain entries in December and you had the "1937" at the top, and when you got to January 1938, by mistake you put "1937"?—A. Yes; it should be 1938.

Q. Now this other writing on the opposite page is also made by you, is it not?—A. Yes, sir; that is made by me.

Q. And that "Witness" there is Mr. Willis's signature?—A. Yes.

Mr. MEDINA. I offer this book in evidence.

Mr. CORREA. No objection.

(Marked "Defendant's Exhibit F.")

Mr. MEDINA. With your Honor's permission I would like to show this to the jury and read it to them.

Now this writing on this side [indicating] is the part I will read in a moment, but it is where he identified the book for
484 Mr. Willis, stating that that was his book and it was all in his handwriting. And over here [indicating] is the part that was in the book in the beginning.

Now you will notice up at the top here it has 1935 with "Werner" and then it has "old" with something I will ask him to explain, but I think it is "debts." I think it is almost fairly clear. $72.50, and then under 1937 it says "And $65," and then December "16.10" and then a ditto mark and $19.10; another ditto marked $23.10, another ditto marked $23.10 and another ditto mark $30.10, all being in December, and then "January 1937," which he explained he meant 1938, there is $5.10; in January $12.10, $19.10, $26.10; all in January; and they add up to $145, and then he takes $72.50 and adds to it because that was the amount of the 1935 advance, and it makes a total of $217.50.

I will bring the book around here so you gentlemen at this end can see how that is, too. You will see these figures are all put there contemporaneously, as he testified, and I will read this part on the opposite page where it says "August 12, 1942. I hereby identify the writing on the opposite page as having been made by me. The figures listed on the opposite page indicate various sums of money loaned by me to Werner Thiel during 1935 and
1937 when Werner Thiel was out of work." Signed "An-
485 thony Cramer," and then "Witness: John G. Willis, FBI., N. Y. C."

I think possibly you gentlemen may want to pass it around before I question the witness further on that [handing exhibit to jury].

Q. Mr. Cramer, referring to this 1935 item, does this say "old debts, $72.50"?—A. Is that word "debts"?—A. Yes; it is debts.

Q. Now when did you figure out that these old debts were $72.50, and put that entry down there?—A. Well, as much as I do recall, at the time when I made the first loans—yes; the first loan to Thiel in 1937, that is added to the old debts.

Q. Let me see if I understand what you mean to say there. As I understand it, you are saying in effect that when you were called

upon to make some additional loans to him in 1937, you stopped to figure out how much he already owed you and you figured out it was about $72.50. Is that what you meant to say?—A. That is what I meant to say; yes.

Q. Well now it is quite evident to me that this pencil date 1935 was not put down at the same time as the $72.50, because it looks like a different pencil and I am wondering if you remember when those entries were made [handing exhibit]?—A. I do not recall that. Most likely the same time.

486 Q. Well, you do not have any definite recollection about that?—A. No, sir; I do not.

Q. Let me see if I can help you a little bit. Now you notice that this page has at the top in the middle the word "Werner"?—A. Yes.

Q. That means Werner Thiel, doesn't it?—A. That is correct.

Q. Do you suppose you put that down first before you put this date "1935"?—A. Well, I am unable to tell you that.

Q. You just don't remember that?—A. I do not remember; no.

Q. But in any event there was a time when you had occasion to figure how much Werner Thiel owed you for old debts, and you figured that was about $72.50?—A. That is correct; yes.

Q. And so you wrote that down in the book?—A. I did.

Q. When 1937 came around and these loans were advanced, is that first one $65?—A. Yes; it looks like 65. That is what it is.

Q. It says "and $65," doesn't it?—A. Yes, sir.

Q. "And $65." Can you remember how that lump sum of $65 was arrived at?—A. No; I don't remember that.

Q. You don't remember that?—A. No.

Q. As a matter of fact if you take the year 1942, before Werner Thiel suddenly turned up, you did not think that this little memorandum book was of much importance, did you?—A. No; not at all.

Q. Passing that $65 item, it looks to me as though there were some things underneath that were rubbed out before you put these other entries down. Can you explain that? You see it looks like the words "December 9th" were erased there. I don't know that it is of any moment, but I am wondering what you remember about it.—A. Well, there is a little rubbed out that looks like "December 9th" to me.

Q. Yes, it does.—A. But I do not know what it is. This book has not been looked at since 1937. That is how much I recall it.

Q. You have not had occasion to look at it since 1937, you said?—A. That is how much I recall it; yes.

Q. Let me make a suggestion—and I do not want you to say yes to this unless you know. Do you suppose when you came to

make these entries here you had gotten toward the back of the book and there was no space, and you just rubbed out what was there and you made those entries?—A. Well, I do not know.

Q. You do not know, that is pure speculation?—A. That is speculation. I could not say that.

Q. It seems curious to me that all these have 10 cents
488 after them—19.10, 30.10. Was that little extra increment for you?—A. Well, that looks funny to me myself; queer rather. I do not know what it was; I do not know how it has come in there. As a matter of fact I do remember only the lump sum and the details about them I do not remember.

Q. Was that a little interest you were charging Werner for the loans?—A. No; I don't think so. I never charged any interest. I do not know what the fact could be.

Q. So the fact that those little 10-cent items are all on there you cannot explain at all?—A. No; I do not know.

Q. Another thing that struck me as a little curious, there is $72.50, $65, then all these other little items with the 10 cents after them, and you notice there are eight of those 10-cent items.—A. Yes.

Q. Eight of them make 80 cents, don't they?—A. That is correct.

Q. So that they do not really add up exactly to the 145 that is down there.—A. Mm-hm.

Q. But you do not know how that happened?—A. No; I am completely ignorant about these figures, since I have not paid any attention since then to them; and the details of them I have forgotten. I do not know what it is. All I know Werner owed me a lump sum of about $200.

489 Q. And that you had these entries put down in this book and you did not pay any attention to that book until after you were arrested and they brought it around and showed it to you?—A. Well, I knew I had a book about my room, but I did not know where it was. I had so many books.

Q. But I say you had no occasion to make any attempt to explain these things that I am asking you about now, until after you were arrested and they brought the book around?—A. That is so. I never knew there was this book.

Q. When you say you never knew there was this book, I do not think you quite mean to say that, because you said just now that you knew you had this book up in your room there.—A. Well, about these particular items: how they were put down.

Q. You had no occasion to think up the details and you do not remember now?—A. That is correct. That is what I meant to say.

Q. A little earlier when I had in my hand the citizenship papers Government's Exhibit 1 I referred to your original declaration of intention to become a citizen, which you signed in 1928. Do you remember that?—A. Yes, sir.

Q. Now in 1936 you actually became a citizen and
490 signed the oath of allegiance, didn't you?—A. I did so, yes, sir.

Q. When you signed that oath of allegiance did you have any mental reservation whatsoever?—A. No, sir.

Q. Did you think as you signed that solemn paper that maybe you would renounce your allegiance to the German Reich or maybe you would do this or that?—A. No; I never had that thought.

Q. You never had any mental reservation about it at all?—A. None whatsoever; no.

Q. When you signed that oath of allegiance did you honestly and genuinely intend in good faith to renounce all allegiance to Germany?—A. Yes, sir; I did.

Mr. MEDINA. May I read that to the jury, your Honor. (To jury:) Now this is the oath that he then signed. I have a copy of it here that I made from that other paper. "Oath of Allegiance" [reads exhibit].

Q. Now did there come a time after Thiel got back from Philadelphia and you loaned him these sums of money, that you stated that you and Werner went to live together?—A. Yes, sir; I did.

Q. That is, first you were up in Henke's there, weren't you, after he got back from Philadelphia?—A. That is right.

Q. You said you were there about three months?—
491 A. Three months.

Q. Where did you and Thiel go after that?—A. After that we rented an apartment at 161 East 85th.

Q. Was that the place that Norma came occasionally and cooked the meals?—A. Yes, sir; it was.

Q. That was a little apartment that you and Werner had together there, was it?—A. Yes, sir; that is right.

Q. I suppose by that time you and Thiel were very close intimate friends?—A. We were; yes, sir.

Q. How did you operate that apartment; you fellows did the work around there and the cooking and everything else?—A. Yes; we did everything ourselves. That is sometimes, or most times; rather, I would say, we went outside and ate.

Q. You did not do much cooking except when Norma came there?—A. That is correct; yes, sir.

Q. How long did you stay there sharing that apartment with Thiel?—A. It was—oh, about from March 1939 until December 1941.

Q. Up to December 1940?—A. That is correct.

Q. Now we are getting pretty well along. And so I ask you whether there was not a time then around December of 1940 that you and Thiel moved from that place where you had the little apartment together?—A. Yes; there was.

Q. Where did you go then?—A. To 171 East 83rd.

492 Q. Was that the place where you had your room when you were arrested?—A. Yes, sir.

Q. How did you arrange matters over at this place when you went there with Thiel?—A. Well, we had separate rooms.

Q. In other words, you no longer had a little apartment together?—A. No, sir.

Q. But now you each had a separate room in an apartment in which the owner of the apartment rented out rooms?—A. That is correct; yes, sir.

Q. Did you stay there and did Thiel stay there until the time that he went back to Germany?—A. Yes; we did stay there.

Q. And do you recall about when it was that he went back to Germany?—A. At what time?

Q. Yes; the date.—A. Oh, no.

Q. I do not mean the exact date, but about when?—A. It was in March 1941.

Q. Did he tell you that he was going back to Germany?—A. Yes; he had told me that he was going back to Germany.

Q. He did not make any secret of it in any way, did he?—A. No, sir.

Q. There were a lot of people that knew he was going back, were there?—A. Yes, sir.

Q. Did he tell you why he was going back?—A. Well,
493 yes; he said he believed he would have a better future; and then he was afraid that this country might come to a war with Germany, so that he as an alien might be put into a concentration camp.

Q. And he wanted to be back in Germany, did he say?—A. Yes, sir.

Q. Now did he say anything else to you on the subject of why he was going back to Germany?—A. Not in particular. All that I do recall is that he had planned for quite a few years to go back, and that this was an opportune time.

Q. Well, it does not sound opportune to me. I don't understand what you mean by that.—A. Well, since he believed this country—he believed this country would be at war with Germany some time after, he might be better off in Germany, as he might be put into a concentration camp, as I mentioned before; and then he thought that his future would be brighter in Germany.

Q. Now by this time you knew perfectly well that he was

pretty well up to his ears in this Nazi doctrine; didn't you?—A. Yes, sir.

Q. As a matter of fact when the time came for him to go did you have any discussion with him about where he was getting the money from and how he could afford to go back?—A.
494 Well, I heard him mention once—we were in our apartment, and Norma was there too, Norma Kopp—that it had been arranged somehow by someone that the money necessary to go back to Germany was loaned, and that later on they had to repay it. That is all I knew about it.

Q. Did he say anything to you about that being loaned to him by this National Socialist Party that he was a part of here in New York?—A. Not that I do recall; no.

Q. But that the money was being advanced to him and that he was going back?—A. Yes, sir.

Q. Now did you have any talk with him before he went back about the money that he owed you?—A. Yes, sir; I did. About five or six weeks or two or three weeks, I am not quite sure about the date, I asked him, that I thought it proper that he might repay the money, particularly the money that I loaned to him in 1935, and he got irritated about it and said that he did not feel himself responsible to repay this sum.

Q. Explain that. I do not just see what you mean by that.—A. Well, he says his coming to Hammond, Indiana, in 1934 had turned out to be a failure, and that he did not feel himself obliged toward me, to repay this money.

Q. Well, how could he blame it on you? You loaned him the money to come at that time.—A. He tried to make me more or less responsible, that he come out there because I had written to him to come, there was an opportunity for
495 him, and since I had written this letter to him he seemed to think I was more or less responsible for his future there.

Q. What did you say when he made that suggestion?—A. Well, I got rather irritated too and said that regardless under what circumstances the money was loaned, he was obliged to repay it.

Q. Did you tell him that?—A. Yes, sir; I did.

Q. What else did he say on this matter of the money?—A. Well, he said: "I may have a chance some other time to repay it."

Q. Did he say anything to you about possibly sending some of that money to members of your family over in Germany?—A. I told him that, you know, "When you are in Germany and if you should be able to repay it you can give the money to my oldest brother in Ollendorf."

Q. Did he say he would do that perhaps?—A. He said he would see about it.

Q. Does that exhaust everything that you said and that he said with reference to these monies that he owed you before he went back to Germany?—A. As much as I can recall; yes.

Q. Now do you remember the date he left to go back to Germany?—A. I do remember the day, but not the date.

Q. Well, I am asking you not for the date but the
496 occasion. Do you remember the occasion?—A. Yes, sir; I do.

Q. Where was it he started from?—A. I believe it was the Greyhound bus line downtown at 42nd Street.

Q. When you say "I believe it was" you mean to say you really remember being there and seeing him go, don't you?—A. Yes, sir; I do.

Q. This way of saying "I believe it" is not as clear as it might be?—A. I was there on the occasion.

Q. You were right there watching him, weren't you?—A. I was; yes, sir.

Q. Who else was there?—A. There was Norma Kopp.

Q. Norma was there?—A. Yes, sir; and——

Q. Did you know at that time that he and Norma were engaged to be married?—A. Yes, sir; I did.

Q. Were there several other people there to see him off?—A. Oh, yes.

Q. About how many people?—A. There were about 12 or 14 people.

Q. About 12 or 14 people there seing him off?—A. Yes, sir.

Q. So the fact that Werner Thiel was going back to Germany was no secret?—A. None whatsoever; no.

Q. Now before he left, did Werner Thiel say one word to
497 you about communicating with you afterwards about any spy work?—A. No, sir; never.

Q. Was anything, even a hint, made by him, before he left to indicate to your mind that he might come back doing some spy work for the German government?—A. No, sir; not a word.

Q. Now you have no mental reservation about that, have you?—A. No; I am positive about it.

Q. Because I want to make my question just as broad as I can, that there was not a word said by him or a hint dropped by him before he left for Germany, to indicate to you that he was coming back on any job or spy work for the German government.—A. None whatsoever. I am positive about that.

Mr. MEDINA. Let me if I may ask to have those exhibits, the postal cards and the letters.

(Mr. Goodkind hands exhibits to Mr. Medina.)

Q. Now I have got here all these postal cards and letters that

were referred to in the Government's case, and I want to ask you a few questions about them. There is one here, Exhibit 64, that has this not very elegant picture of Niagara Falls on it. It is addressed to Werner Thiel, and you do not appear ever to have mailed that [handing to witness]. Do you remember that?—A. Yes, sir: I do.

Q. Was there any reason why you should not mail that?—
498 A. No definite reason. I had written it and put it in my pocket and forgot about it, and a couple of weeks later I found it, so I did not send it at all.

Q. You used it as kind of a bookmark in one of the books, didn't you, as I understood the testimony? Don't take that from me; I am not sure of it at all?—A. Well, I do not remember that.

Q. You do not remember whether you had that in one of the books or not?—A. I do not remember it.

Q. But there was not any reason why you should not mail it, but you just did not mail it?—A. That is correct; yes.

Mr. MEDINA. May I read that to the jury, your Honor? It seems of no particular importance, but I just want to read that. [Reads exhibit to jury.]

Q. Did Henke in July 1941, have a place up around Niagara Falls?—A. Yes; in Spring Brook, which is not very far from Buffalo.

Q. In Spring Brook which is near Buffalo?—A. That is correct.

Q. Is that the same Henke at whose place you and Thiel stayed as you testified?—A. No.

Q. That is a different Henke?—A. The same family, but it is a different place.

Q. It is a different place and not the same man?—
499 A. It is the same man, but in Buffalo. At that time they were in New York.

Q. That is what I meant to say in the first place. So that the Henke referred to in this postal card is the same Henke had the apartment in St. Nicholas Avenue in New York City that you told us about?—A. That is correct.

Q. Who is this "Kathie"? It says "Greetings, Kathie."—A. It is his wife.

Q. Who is "Willie"? It says "Greetings, Willie."—A. That is Mr. Henke.

Q. You meant, writing those words there in German, and the translation is what I have been reading, that both Henke and his wife were sending greetings to Thiel?—A. Correct; yes sir.

Mr. MEDINA. May it be conceded that the censorship stamps are those of the British censor on Exhibits 68 and 69?

Mr. CORREA. I think it is probably the British judge. Actually

our own looks very much like it, but I do not think our own was set up at the time.

Mr. MEDINA. No; there was no United States censorship set up at the time, which we may take to be the fact subject to correction.

Mr. CORREA. Yes. I think I described them as British
500 when I read the exhibit to the jury, and I think that is what they probably are.

Mr. MEDINA. I think you did. So we may have it understood subject to correction that these slips pasted here on Exhibits 68 and 69 are British censorship stamps, and that at that time there was no United States censorship as yet set up.

Q. Now referring to these letters, and I mean these two letters to Fiuel and the letter to Hubert Thielmann, which have been placed in evidence, I want to ask you a few general questions. Now since the brief period of your service in the German army in the last war did you ever regard the United States as an enemy?—A. Never.

Q. Referring to that same period of time did you ever entertain any intentions hostile to the government of the United States?—A. No, sir.

Q. Did you ever for one moment contemplate the possibility of your again joining the armed forces of the German Reich to fight against the United States?—A. Never had a thought. Never had a thought of that.

Q. The statement has been made here of the government's claim of a motive which you are supposed to have had, and with reference to that I ask you these questions. Did you ever entertain a feeling of greater allegiance to Germany in this war than to the United States?—A. No; I have not.

Q. Did you ever entertain a strong antipathy to the
501 position of the United States in the present war?—A. Will you explain this a little, counsel?

Q. Let me get the exact phraseology here.

Mr. MEDINA. I wonder if I might borrow your Honor's copy of these minutes. [minutes handed to Mr. Medina].

Q. The reason you hesitate, Mr. Cramer, is because you have a mind before Pearl Harbor and after Pearl Harbor; is that it?—A. That is correct; yes, sir.

Mr. CORREA. I object, if your Honor please, to counsel leading that way. It seems to me on a subject such as this—and I might point out, as I think your Honor has observed, we have had not only leading but I might say forcing the witness heretofore, but I think on this subject we might let the witness speak for himself.

The COURT. Do that, Mr. Medina.

Mr. MEDINA. Yes; I will, your Honor. I quite appreciate that a good deal this morning I have been leading him, and I have at

tempted to do that on noncontroversial points. I know I should not lead him on matters that are controversial, nor do I intend to.

The COURT. It is 1 o'clock. Shall we take a recess?

Mr. MEDINA. I do not think we ought to leave this right
502 here. It is a crucial point. Just a question or two.

The COURT. Yes; go ahead.

Mr. MEDINA. Just a question or two.

The COURT. Take all the time you want.

Mr. MEDINA. I have a few questions. Then we might recess to 2:15.

By Mr. MEDINA:

Q. The statement Mr. Correa made to which I have referred is at page 217 of the minutes, Mr. Cramer, and it is as follows: "However, in addition to specific intent we will show a motive, the motive consisting of a deep-seated feeling of greater allegiance to Germany in this war than to the United States." That you deny, do you not?—A. I do deny that; yes, sir.

Q. He goes on, and I quote again, "and indeed a strong antipathy to the positions of the United States in this present war." I asked you the question whether you ever entertained any such strong antipathy to the position of the United States in this war.—A. I did not; no, sir.

Q. Now when you hesitated about that I thought possibly those words "in this present war" were not completely understood by you, and I want to have you explain anything you had in mind there, if they were not clear.—A. Yes, sir; I will explain that to the jury, to the judge. I thought you were referring to a
503 time before the war, and before the war I was opposed to the United States entering the European conflict, but when America was attacked my attitude has been that we can do nothing else but fight, and I was on the side of the United States.

Q. While this question may be slightly leading I do not think Mr. Correa will object to it: When it says "in this present war" that might mean the war they started in 1939 and which has continued ever since, or it might mean the war in which the United States became a participant beginning December 7, 1941, might it not?—A. I thought you were referring to the former.

Q. That is what I supposed you did. Now taking your attitude before Pearl Harbor, before December 7, 1941, did you then have a different feeling than you had since then?—A. Yes, I have.

Q. What was that feeling?—A. Well, I thought that America should not join the European war at all, because my fatherland, the land where I came from, was involved; but since this United States, these United States, our country, got attacked, I have changed my opinion because we can't do anything but fight and win, otherwise it will be the end of our country. That has been

my attitude which I have ever since maintained since this country was attacked.

Q. Going back to the time before the United States was in the war, did you genuinely sympathize with the German
504 people?—A. With the German people; yes, sir; I did.

Q. Why did you do that?—A. Well, I believe coming from Germany I am entitled to a little love for my fatherland.

Q. Your family, your brothers and your sister are there now, aren't they?—A. That is correct.

Q. And that is where your mother and father were?—A. That is right.

Mr. MEDINA. All right, Your Honor, shall we return at 2:15?

The COURT. 2:15?

Mr. MEDINA. Well, 2 o'clock is all right. I did not realize I would take such a short time.

The COURT. We will take an hour, and that will be five minutes past 2.

(Recess at 2:05 p. m.)

505 AFTERNOON SESSION

2:05 p. m.

ANTHONY CRAMER, resumed the stand.

Direct examination continued by Mr. MEDINA:

Q. When I was on the subject of your citizenship there was a question I meant to ask you that I will come back to: Since you became a citizen of the United States, have you voted on every occasion that you were qualified to vote?—A. Yes, sir; I have.

Q. Now turning to this letter, Exhibit 68, with the envelope and so on, I read from the translation. You said in this letter to Thiel of November 25, 1941, "You understand that I can toss you only small crumbs from this fodder field since this letter will probably go twice through enemy censorship." What did you mean by the words "go twice through enemy censorship"?—A. Well, England and Germany.

Q. Did you have any reference to the United States censorship?—A. No, sir.

Q. As a matter of fact, as it has just been conceded here just before the luncheon recess, there was not any American censorship then, was there?—A. No.

Q. As far as you knew?—A. That is correct.

Q. Now when did you first meet Norma Kopp?—A. I believe it was in May 1937.

Q. And she said that you introduced Thiel to her
506 up at the Kolping House, is that right?—A. I cannot recollect that. I do not know.

Q. Is it a fact that you did meet her up at the Kolping House yourself?—A. I have seen her there the first time, that is correct.

Q. And when you first made her acquaintance, was that up there in the Kolping House, as far as you recall?—A. That is correct; yes, sir.

Q. What you do not remember clearly is whether you introduced Thiel to her or not?—A. I do not remember.

Q. That you don't remember?—A. No, sir.

Q. Did she tell you where she came from?—A. Well, I learned of that later, months later. I do not think she did.

Q. What did you find out about that when you did get the information?—A. That she came from Frankfort-on-Main in Germany.

Q. And you first made her acquaintance you say when?—A. Well, I would say May 1937. I am not positive about that.

Q. About May 1937?—A. That is correct; yes, sir.

Q. After that time did she become friendly with you or with Thiel or with both of you?—A. Well, Thiel took an unusual interest in her which later on was, I believe, love, love for Norma Kopp.

507 Q. There came a time when Thiel fell in love with her?—A. That is correct; yes, sir.

Q. Was that shortly after they met or some little time later?—A. Well, quite shortly after they met the first time, he fell in love with her.

Q. Did they act toward one another from that time as though they had an affection for one another?—A. I believe Thiel was more in love with her than she with him.

Q. When, as far as dates are concerned, did he begin to show some affection for Norma?—A. Well, I don't know the exact date. I believe about eight or ten weeks after they met, or five or six weeks; I am not quite sure about that.

Q. Did there come a time when she seemed to return his affection?—A. Yes.

Q. Can you tell us approximately when that was? We do not have to have it exactly, you know.—A. In the Summertime of 1937.

Q. So that from that time on they indicated a certain affection for one another?—A. Correct; yes, sir.

Q. Without going into too much detail, I wish you would tell the jury how they acted toward one another from that time on?—A. Well, I am not very well informed about that subject, but I saw them quarrel once in a while and then again make up

508 quite fast. They quarreled tonight and made up again tomorrow.

Q. Did Norma Kopp come around to the apartment where you and Thiel were living?—A. Yes, sir; she did.

Q. And about how often did she come there?—A. Well, that depended upon her work. Sometimes she was prevented to come and if she was in the city she came almost every evening.

Q. And did she go out with Thiel a good deal?—A. Yes; she did.

Q. Didn't go with you, did she?—A. No; we never had any personal effection for each other. We were friends, that is all.

Q. Now do you remember what sort of work she did?—A. Well, yes; as she told, she was a laundress.

Q. Yes; I heard her say that.—A. Later on she did some kind of domestic work.

Q. Isn't it a fact that during the period of time you knew her, she was a domestic servant?—A. That is correct, sir.

Q. And that is what she was during all the time you knew her, wasn't she?—A. She was; yes.

Q. And that she worked with families somewhere in the neighborhood of New York, either in New York City or near New York?—A. That is right; yes, sir.

509 Q. Do your recall whether or not there came a time when you were given to understand that she and Thiel became engaged to be married?—A. Yes, there was; shortly before Thiel left for Germany.

Q. And how did you find out about that?—A. Well, that I do not recall exactly; I believe a friend of Norma told me.

Q. Thiel did not tell you himself?—A. No, sir.

Q. Nor Norma either?—A. No, sir.

Q. But you heard it from somebody else?—A. That is correct.

Q. That they were engaged?—A. Yes, sir.

Q. When Thiel left did she kiss him good-bye?—A. Well, I think she did. I am not quite sure about that. I think.

Q. But you do not remember for sure one way or another about that?—A. No; I am not positive about that.

Q. That brings us down to Monday, June 22, 1942, and before I take that up, I want to ask you if there is anything that I have forgotten, anything about your past life there that you think you want to state about, that I neglected to question you about?—A. I do not think so; no.

Q. Before that Monday, June 22nd, did you have the slightest idea from any source that Werner Thiel was coming back to the United States?—A. No, sir; I did not.

510 Q. You had in the meantime received a number of postal cards from him which have been marked in evidence here; haven't you?—A. Yes, sir.

Q. And you had those right up in your room there?—A. I did; yes.

Q. Was there anything in any of those postal cards that gave you the slightest intimation that he was coming back?—A. No, sir; he did not.

Q. I have some recollection that you mentioned, or there was mention made in one of these letters, of another letter that came from Thiel in Germany, asking about Norma. Am I wrong about that, or was there some such letter?—A. I think there were two.

Q. Now one of those letters is here. Is the one that came back with the notation "Returned to Sender. Service Suspended." No; I withdraw that. That was your letter, of course.—A. Yes.

Q. Now as to the letters from Thiel, were any of those up in your room there?—A. I believe there was one or two. I am not quite sure about it. As much as I do recall, Thiel wrote altogether three letters to me, but I am not quite sure about that.

Q. Let me see if I can refresh your recollection about that. I have some recollection that somewhere there is a statement that you had received one letter and a postal card from him
511 after he reached Germany?—A. That is correct.

Q. Let me just take the time to find where I got that. Yes, right here in your letter to him of November 25th, you say "From you I have so far received a card and a letter. Though your communications are of a very laconic nature, I am nevertheless glad when you let me hear from you." Is your present recollection that from the time he reached Germany, you only received those two communications from him?—A. According to that letter, yes.

Q. And from that letter is your recollection refreshed so that you can say there were these two; the card and the letter?—A. Yes. I believe there were not more than two. I am quite sure about that.

Q. When you say no more than two, you mean by the two to include the card and the letter?—A. No; by that I meant two letters and a card.

Q. You have some recollection of two letters and a card?—A. I think I received two letters; yes.

Q. Do you have any recollection of what you did with those letters?—A. No, sir; I do not know.

Q. If they were not found in your room, you do not know where they are?—A. I do not know where they are.

Q. I show you this Government's Exhibit 62, which is a
512 postcard, but there is a lot written on it, both on the front and on the back. Do you suppose you could have recalled that as a letter?—A. No, I could not tell you that, sir.

Q. That is much longer than the writing on those other cards.

isn't it?—A. You see, it is a matter of uncertainty. I am not quite sure if he wrote one or two letters. One thing I do know that Werner was always rather sluggish in writing.

Q. But as to whether your recollection thinks of this card as a letter or just as a postal card, you just do not know?—A. I do not know.

Q. Did you ever throw any communications that you received from him away with the intention of deliberately getting rid of them?—A. No, sir; I never did.

Q. Referring to either the letter, or the two letters, whichever it was, that you received from Werner Thiel after he got back to Germany, tell the jury as far as you can what is your recollection of the contents of those letters, or the letter, whichever it was?—A. Well, I do not recall much. I do know that he stated in one that he was in Berlin and that he has seen his folks at home and that his sisters were quite a bit enthusiastic about his coming back and that he was getting along very well with his family.

Q. Did he say anything about Norma?—A. Oh, yes,
512-A and he gave his greetings to Norma; and that I do recall. I am positive about that.

Q. Did he tell you anything in any written communication, whether by letter or by postal card, to the effect that he was going to some school to learn how to blow up factories, and things of that kind?—A. No, sir; never did.

513 Q. Was there anything in those communications that even in the remotest sense conveyed to your mind the impression that he was doing work of that kind?—A. No, sir; never.

Q. Now we come to the morning of Monday, June 22, 1942.—A. That is correct.

Q. Had you been at work——A. I had worked——

Q. During that night?—A. Yes, sir. I had worked from Sunday to Monday morning.

Q. You mean you worked on the night shift over in that factory in Brooklyn?—A. That is correct; yes, sir.

Q. And you got back to your room about when?—A. I would say it was about a quarter past 9.

Q. What did you do?—A. Well, I had my breakfast, which took up about 15 minutes, and went back to my room, turned on the radio and started reading a book, and it was about, I would say 10 o'clock, when the bell of my apartment rang and Mr. North, who is my next-door neighbor, went to answer the call.

Q. How do you know that? Did you just infer that by hearing him go up the hall?—A. That is correct. I heard his door opening and I know him by his steps, by his gait, and I heard a strange voice calling my name "Cramer." So hereupon Mr. North stepped to my door and called my name "Cramer, are you at home?"

514 And since this was a strange voice I thought it was a strange man and I did not answer; I pretended not to be at home. And about ten minutes later a note was shoved under my door.

Q. You were lying right there and saw the note?—A. I was in the room and I saw the note was being shoved under the door; that is correct. And I picked it up and it had words written on it. It said "Be at the Grand Central station tonight at 8 o'clock, the upper platform near the information booth. Franz from Chicago has come into town and wants to see you; don't fail to be there." Well, my first reaction to this note was not to go down there at all, as I did not know of any Franz in Chicago. So I decided then and there not to go down there at all. But when evening came curiosity got the best of me——

Q. What were you doing in the meantime?—A. Oh, I had been sleeping.

Q. You went to sleep and then when you woke up you say curiosity got the best of you?—A. That is correct; yes, sir.

Q. What did you do with that note?—A. I don't know; that must have wandered into the wastebasket.

Q. As far as you remember you threw it away?—A. That is correct, sir.

Q. Did you have any particular reason for throwing it
515 away?—A. None whatsoever; no. Mr. North can tell you, if you would be interested in that, that he has put the note under my door.

Q. Yes; but I say after you read it and saw what it was I was interested in what happened to the note.—A. Yes.

Q. And you say as far as you remember you threw it away?—A. That is correct; yes, sir.

Q. Did you recognize the handwriting?—A. No, it was a strange handwriting.

Q. Now go right ahead and tell the jury what you did that evening.—A. So when evening came I decided to go down after all and see who it was. It was about 7:30 when I went down, and ten minutes later I arrived at the Grand Central depot. I waited around the information booth until about 8 o'clock. I had an impulse to go back home, but I said to myself I better wait another ten minutes to make sure if someone comes that I have met him or that I have not missed him. So I waited around another ten minutes and then turned around to go back home, because I had resolved or had decided to go back home at ten minutes past eight. And I believe I did not walk further than, or had not walked more than three or four steps when someone called my name "Tony." So I turned around and there was Thiel coming toward me—Werner Thiel. Well, I was amazed, you know. I looked before I trusted my eyes, and all the while he was walking toward me.

516 and I said, "Werner, is that really you or your ghost?" He said, "It is me all right." I said, "For heaven's sake, where do you come from? It is the last thing I though you would turn up; I thought you were in Germany, and some people have predicted you were dead in this country." Some friends of ours in Hammond, they actually had written Thiel had died in Germany from bombing. So I told him, "For heaven's sake, I am almost thunderstruck to see you here." Then all of a sudden I said, Say, how have you come over, have you come by submarine?" He gave me a very startled look and smiled and said "Some other time I am going to tell you all about this." Then he continued to say "Remember now my name is Bill Thomas and I am anti-Nazi—I am anti-Nazi."

Well, I didn't know what to say. I said, "Whatever it is, you know, let us have a drink first and celebrate our reunion." So we walked around to the Twin Oaks Inn at Lexington Avenue and 44th Street. There we settled down and ordered a drink. I believe we sat right alongside of Lexington Avenue in the corner there, and Werner Thiel immediately started to question me about Norma Kopp, how she had been, where she was working and what she was doing, and if she went out with other boy friends, if she went to dances, and numerous other questions. So I
517 answered them to the best of my knowledge and said "She is well and she asks quite a few times for you and speaks about you," and he seemed to be very pleased with that.

Q. How long do you suppose you were there at the Twin Oaks Inn that Monday night with Werner Thiel?—A. Well, I believe it was about 8:25 when we entered, and at what time exactly we left I cannot recall, but I believe it was 10:30, something like that.

Q. What else did you talk about that evening when you were there with him besides Norma Kopp?—A. Well, I said to him that Norma was bound to come to the city, that she worked in Connecticut and came back every few weeks, and I told him to make sure that she does come I could write her a note, a letter, as I corresponded with her quite often. She had complained about being very lonesome in the country and she would appreciate if I wrote a letter to her. So previously to that I had written Norma quite a few letters and I suggested to Thiel to write her a letter on the occasion telling her that he had come back to America.

Q. Well, why didn't he write her himself?—A. Well, he did not know the address, and I offered the service to him to do that without he approaching me to do that.

Q. Did you have any particular reason for the suggestion
518 that you write to her and tell here?—A. No, I didn't have any reason at all. I simply wanted to make sure that she did come and see Werner.

Mr. MEDINA. Let me just get that letter [Mr. Goodkind hands exhibit to Mr. Medina].

Q. I wish you would just take a glance at this letter that you wrote to Norma, and see if it refreshes your recollection at all [handing to witness] as to why you wrote the letter to her.—A. Well, I have had no definite thought about writing the letter. I simply wrote her to make sure that she would come, as Werner Thiel seemed to be very, very anxious to see her.

Q. But you did not tell her in the letter that Werner Thiel was here, did you?—A. Well, he told me, you know, "You better not mention my name, because she may get so excited that she faint," or something to that effect. So I abstained from mentioning his name, on account of his proposing it to me.

Q. Did you write it that way so as to surprise her?—A. Well, yes; that was another thing, and I wanted to tell her personally by word of mouth to see the effect upon her and have the gratification to bring her glad tidings—good news.

Q. You knew that that was going to be something of considerable interest to her, didn't you?—A. Yes; sure.

Q. This was the man she was engaged to marry?—A.
519 That is correct.

Q. You did not write this letter to her that night, did you?—A. No, sir.

Q. So that I will come back to that a little bit later, and I ask you now what else you talked about with Werner Thiel that evening.—A. I then asked him if he had visited my folks in Germany, in Ollendorf. He said no, he did not have a chance, he had written a couple of letters but they have not been answered, these two letters. So then I asked him about his folks, how they were getting along, and he said "they are doing all right. I have suffered a grievous loss," he said, "my brother Herbert," his youngest brother, he had died in Russia, fallen in action, and another brother of his, his eye had been shot out. So I expressed my sorrow to him and he seemed very much under the strain of emotion at this time.

Q. Now during that talk that you had with him that first evening, Monday, June 22nd, did he tell you anything about what he was here for?—A. No, sir. I asked him several questions. I will come to that later.

Q. Then you go right ahead and tell the rest of the conversation, but I want it down to June 22nd now, and then later on we will come to the next day, and so on?—A. Yes.

Q. I would like to get just what happened that evening.—A. Well, he told me several stories about the Russian front
520 then. His brothers had told him that the war in Russia had been according to the sayings of his brothers, very

brutal, and he told several stories rather about the war itself in Russia. One of them I do recall was that near Rostov the Germans had been forced to withdraw and had left a couple of hundred wounded soldiers in a hospital, field hospital, and two or three days later when they had recaptured this region they had found the Germans drived out of the hospital and disrobed and frozen to death.

Q. That is what he told you?—A. That is what he told me; I don't know that it is true. Well, I believe I must have been talking quite loud. There was a man behind us, he seemed to be listening intently, and he said "You better not talk so loud, because you know we seem to arouse much attention around here." And I noticed there was a man sitting in the back of us seemed to be listening to us intently. Well, we paid no further attention to him then, and then—oh, I asked him then about his—oh, pardon me, he told me about his oldest brother, his oldest brother he said had made quite a success out of himself, he was a director of a big factory in Hamburg and quite an influential member of the party, of the Nazi party in Germany; and then he asked me "Guess what surprise I have for you?" Well, I said I don't know. And then he said he met Eddie Korde. Korde was a man whom we
521 had been together with in 1931 and 1932 in New York.

Q. That is K-o-r-d-e?—A. That is correct; yes, sir. And Korde had been in Turkey for the last few years and accidentally he had met him in Dortmund and they had spent quite a hilarious afternoon together, and Korde had bragged quite a bit because he was going to get married to a German baroness.

Q. Korde was going to get married to a German baroness?—A. To a baroness, he had made much to-do about that fact. So he told me several details about—anecdotes rather about Eddie, and we talked quite a bit about his having been in New York at that time.

Q. This is Eddie Korde?—A. Eddie Korde; yes. And he asked me if I recalled what we had called Eddie at that time. We had nicknamed Eddie a short nickname. And then he told me about Willie Schneider. Willie Schneider was a fellow whom we had known in New York and he had gone back to Germany also, in 1939 or 1940, I don't know. He had met him in Germany. And Peter—his second name I have forgotten—Peter was pining to come back to America, you know.

Q. Did you remember this Peter?—A. Yes; sure, I had met him, but I don't recall his second name.

Q. You knew what he looked like?—A. Yes.

Q. You and Thiel had been friends of his?—A. He had
522 been in the Kolping House; I had met him several times. Peter was planning to come back to America, he said.

Willie Schneider did not like it so well in Germany, either, he said, and he told me about Joe Nussbaum. He was a barber by trade and his wife had left for Germany and later on he had gone back, too.

Q. Joe Nussbaum was another one of the men you knew in New York?—A. That is right.

Q. And had gone back to Germany, and Thiel had met him there?—A. Yes; that is right. And he told me about the family quarrels. Maria Nussbaum and Joe, these two had quarreled and separated in Germany, and Maria had asked to come back to America; she had made up her mind to come back to America if possible, as soon as possible. Oh, then I told Thiel that I had received a letter from the FBI asking about his whereabouts, and as they were looking for him, and I told him that I had written back that he had gone to Germany. And then he said, "You know, that is why I am now under the name of William Thomas; I don't want to have any trouble with them." And he showed me a draft card which was printed to the name of William Thomas. I asked him, "Where did you get that?" He said "In Chicago," he got that in Chicago. So I said, "But you know if they catch you with that you are going to be"——I don't know what I said, anyway
523 I told him that could be bad for him, forging a——

Q. Having a draft card with a fictitious name on it?—A. That is correct; yes sir. And then I asked him to tell me "Why did you come back, and how?" Well; he said, "I had a good chance to get away from Germany and I took it. I wanted to be back in America. I am going to settle down here and get me a job as a machinist." Well, I told him that it was a very funny thing. Well, he said, "Don't worry, you are going to learn all about it. As soon as Norma comes down here we are going to discuss the whole thing over a glass of wine. I will tell you all I have to tell you."

Then I told him "How are things in Germany?" "Well," he said, "if Russia is not going to be beaten this Fall"—that means Winter 1942 he meant; 1942 that is correct—"then Germany I believe is going to lose the war," he said because in Berlin as well as in Dortmund I have noticed a current of unrest. We have so many people in Germany that have been Communists before, and those are the ones that are liable to stir up trouble. They do not do it openly but the hatred or the discontentment is there," he said. "They have acknowledged themselves to be members of the Nazi party but their conviction is still Communistic, and we have had the time when the Communistic party was at its height,
524 when we had seven million booked members Communists in Germany, and those are the ones that will make trouble as soon as there is a chance," he said, or something to that effect.

Well, we talked about the causes of the war and I asked him

what he though, if Germany could win the war. Well, he was inclined to believe so if Russia could be defeated in the Summer of 1942, and he said "I believe the biggest blunder was made by the German High Command when they failed to invade England in 1940 after the fall of France."

Well then we spoke some more amout the history of Germany and I had the attitude to call the Germans rather uncompromising, and too literistic, and as partly being the cause of this present war, but he was inclined to attribute it to the failure of England to understand Germany and the dominant attitude of England on the European Continent.

So we discussed these different matters for quite a time, and I asked him if he had ever been bombed in Germany since he had been—no, pardon me. I asked him first, as I do recall, what he had been doing in Berlin, and he said he had been working in a factory as an inspector and that he had not liked his job at all because he had to work twelve or thirteen hours, and the work itself was very hard and very difficult; that he had welcomed the
525 chance to get away from that, and then I asked him how it was; if the German cities had been bombed badly, as badly as we read in the papers here. Well, he said he had seen Hamburg; he had been with his brother in Hamburg and Hamburg was pretty well damaged. He admitted that. As well as Bremen, whereas Berlin was not so badly damaged, he said, and I then——

Q. Did he say anything about the money?—A. No. I am coming to that later.

Q. That was not discussed on that occasion?—A. Yes; it was, later on. Oh, I asked him how it felt to be bombed. Well," he said, "the first time I got bombed I was scared to death, but as soon as it gets repeated a few times you get used to that, too." And then he added—what he said—"Oh, then you know the only time I really was scared to death was when I came over here we got bombed." One thought, it came to me in a flash, I said "Then you have come over by submarine, haven't you?" He said "Some other time," he said, "you know you are asking questions like an investigator." He got irritated that I asked so many questions. "Your are going to learn about it." Well, I left him alone then. I was quite mystified about his behavior, that he was not going to tell me anything.

I waited an opening, and I asked him if he had ever
526 listened to a foreign broadcast in Germany. He said he had been with his brother in Hamburg once and that both of them had been listening to Boston, to the Boston radio, and I asked him if he had seen one of the German broadcasters, a couple of Americans, one called himself "O. K. speaking," which was an American, and another one—I forget the name, but we had listened

to their broadcasts from Germany in this country, Thiel as well as I, and "Lord Haw Haw," and I asked him if he had seen any of those fellows in Berlin, and he said no.

And then I asked him—no, I told him that I had listened to a broadcast from "O. K." and "O. K." had described an experience from a submarine; he himself had been in the submarine and dived and had gone through all the experiences of crash diving.

Q. Is that what you heard over the radio?—A. That is correct.

Q. And you were explaining to Thiel you had heard that over the radio?—A. That is correct. I did that because I thought if I tell this story he might listen and tell me his whole experience. I wanted to hear it. And I told him also a story how this "O. K." had been introducing a German submarine commander who had given his experience. He had told his story——

Q. This is some more over the radio?—A. Yes. I told
527 him this story I had heard over the radio and——

Q. Well, after you got through telling him about what you heard over the radio and so on, did the conversation go on to other subjects?—A. Well, he told me he had heard a similar story from a young submarine officer in Berlin who had told him that they had been forced to crash dive and while they were doing that they had been bombed or their conning tower had been damaged so that later on when they emerged again they were unable to get out of the submarine, so this young submarine officer was forced to go through the window in order to get to the conning tower and when he was out another attack by a flyer, as he said, had occurred and they were forced to crash dive again and this young officer had been left outside——

Q. Out in the water?—A. Out in the water, swimming, and two or three hours later the submarine had come up again and they had found this fellow.

Q. This is the story he was telling you?—A. He was telling me.

Q. That he heard that from some source?—A. Some young officer had told him this story. So then you know he said then, "I am in a position now to give you your money back." "Well," I said, "that is good, but how? When you left you had no
528 money." "Well," he said "I am well fixed now. I have about three and a half or four thousand dollars with me, between three and a half or four thousand dollars." I said, "You mean to say American money?" He said "Exactly." "But where did you get it?" I asked him. "Well, if you have the right kind of connection you can even get dollars in Germany." That is what he said. "Well, only" he continued, "I do not like to carry this money around with me. I wonder where I could put it?

Q. This is Monday night still?—A. This is Monday night; yes.

sir. And I told him "Well, you can rent yourself a safety deposit box. That is a safe place to have it in."

Q. You said that?—A. I told him that. I said that, yes, "or still better, I have a safety deposit box. You can trust to me and I will put it in there." Well, he hesitated a moment and then said "O. K. You can do that," and I told him "O. K., I will take it, and I will take the money you owe me and I will take it off."

Q. Did you make that suggestion so that you could get your money?—A. That is correct. "Well," he said, "how much do I owe you?" "Well," I said "as much as I do recall, it is about $200. If I am not mistaken, I have a notebook home and there it is marked down how much you owe me."

529 Well then I believe it was ten o'clock, something like that, or half past ten, and we fell into gossip about acquaintances. He asked me about several of our acquaintances, William Henke, Bernard Hellman, and several other people whom he as well as I knew, and from there we went to the Grand Central depot, and we came to the Hotel Commodore, and he said "This is where I live. This is where I stay, and it has a swell bar," and he said "Let's have a drink before we go back home."

Q. Another drink?—A. Yes, sir. So we went inside and stood at the bar I believe for another ten minutes and then we went outside and had a little talk outside, walked up and down before the building of the Commodore and Grand Central, and I do not know the exact time but I believe it was something around eleven o'clock when I went back home. Oh, and then he said before we left, "Can I see you again tomorrow evening?" I said, "All right, I think I can meet you again tomorrow evening."

Q. Didn't you say something to him about coming up to your apartment the next evening?—A. Oh, yes; I believe I did. I did; yes, sir. I said "You can come up to Yorkville and see me in my apartment." He said "No; I would rather not come up to you because I have too many acquaintances there and I don't
530 want them to see me." That is what he said, and he said, "You can come down here and see me at the Twin Oak."

Q. When he said he did not want to come up there and had so many acquaintances and did not want to be seen, did you think that he had reference to this draft business or this trouble with the draft board?—A. I did not know what it was, but that was the only thing I suspected him of, being anxious not to be seen by anyone.

Q. You did know at the time he made this remark about this draft board situation, didn't you?—A. Well, yes; I had been receiving a letter from the FBI asking for Werner Thiel.

Q. Well, now, go right ahead and tell us anything else that

occurred that evening of Monday, the 22nd, if there is anything left you have not told the jury.—A. Well, then I went back home. I don't know the exact time but I believe it was eleven-thirty when I came back home.

Q. You have told us about all you remember about what was said that evening?—A. That is correct; yes, sir.

Q. Now let me ask you something else; did he say anything to you that Monday evening about Kerling?—A. No, sir. He did not mention him at all.

Q. Now then you went home, that is, back to your room, late in the evening of Monday the 22nd. Now did you
531 have to work on Tuesday?—A. Yes; I had to work. I had changed my shift. I had to work during the day.

Q. That is, sometimes you worked at night and sometimes you worked again in the daytime?—A. No; I worked steadily nights, but we had some particular kind of work to do in the factory and I was required to change my shift for about three or four days in order to be in during the day.

Q. But what I am getting at is, you did not bring about that change in the shift. You just told you were to work in the day shift on Tuesday.—A. That is correct; yes, sir.

Q. You did work on the day shift on Tuesday, didn't you?—A. Yes, sir.

Q. Then there came a time when you came home from work Tuesday evening?—A. That is correct.

Q. And I suppose you got your dinner and then went down to meet Thiel?—A. That is correct; yes, sir.

Q. In the meantime had you written this letter to Norma Kopp?—A. No, sir; I did not.

Q. Was there any reason why you did not?—A. Well, I did not see any particular hurry about it.

Q. Well then I guess you did not have much time on your hands to do it either, did you?—A. Well, I would have had the time, I believe, but I did not think about it.

532 Q. Anyway, you went down Tuesday evening to meet Thiel according to this arrangement that you made with him when you left him Monday night?—A. Yes, sir; I did.

Q. Now, where did you go?—A. Well, Monday evening, or Tuesday evening, I went back to the Grand Central depot, downtown, and went to the Twin Oak Inn. I arrived there about five minutes past eight and I did not see anyone, so I waited around there and I believe it was twelve minutes past eight when Thiel came in. We said hello to each other and settled down and Thiel ordered a drink, and the first question——

Q. By the way, who paid for all these drinks the first night?—A. Thiel.

Q. I do not suppose either of you drank an awful lot?—A. No; we had about two or three drinks.

Q. Now go ahead with Tuesday night.—A. The first question he asked me was if I was written a letter to Norma Kopp, and I said no, and then he started to question me some more about Norma. He was very inquisitive and anxious to learn all he could about Norma, and I exhausted my mind as well as possible and told him all the details, and then I—oh, and then he asked me what I had been doing in New York all the time, and, well,

I said, "I still have my old job," and I told him that I had
533 tried to get into the Navy Yard but on account of the mistake I had made in the beginning, I had planned as a flange turner—oh, and then he asked me, "What is going on in New York in general?" Well, I told him, "There is a big bond drive on right now," and I stated the incident you know, that I had slammed the door into a minuteman. "Well, why did you do that?" he said. "Don't you think it is very dangerous to be unpatriotic today?" "Well," I told him, "the man was very provocative and very imposing upon me," that I would have bought something if he had not been so provocative.

"Well," he said, "I believe myself that I am going to buy bonds myself." [Laughter.]

That is what he said. Well, that is a fact. He told me that.

Q. That is all right. Go ahead.—A. It sounds funny, but that is what he has been telling me. Oh, and he asked me about my trip to Buffalo. He told that he had received my letter from Buffalo, where I stated that I had visited Henke and seen Niagara Falls and the friends in Hammond, Indiana, as well as my friends in Chicago——

Q. Now, did there come a time when he said something about Kerling?—A. Yes, sir. That was shortly before nine o'clock. "At nine o'clock," he said, "you know I am going to see a friend of ours, or a friend of mine, rather"—he meant himself—
534 "he is going to see us tonight. I expect him at nine o'clock."

He said, "Do you remember Eddie Kerling?" He said, "Eddie." He said, "You must have seen him in New York. He went back to Germany with Joe Nussbaum, two years ago." Then I did recall it. I asked "Where did Eddie come from?" He said, "He came over with me. We have come together."

I asked, "What does he want to do here?" He said, "He wanted a change. He dislike Germany and has come to this country," and shortly after that Eddie Kerling——

Q. Before you come to the point where Kerling came in, was anything said about Kerling's wife?—A. No, sir.

Q. I had an impression that Kerling's wife was here, but I am probably wrong about that.—A. Yes. And shortly after that

Kerling showed up and when I saw him face I remembered him; that I had seen him in Joe Nussbaum's barber shop as well as once Werner Thiel had brought him into our apartment—Joe Nussbaum as well as Eddie Kerling. Those are the two occasions I recall having seen him.

So we greeted each other and I said, "What have you brought back to this country? I thought you liked Germany better than America." He said, "No; I have been in Germany for two years now and I found many thing which I disagree upon; one is the coercion that is taking place throughout Germany," he said.

Q. Kerling told you that?—A. Yes, sir. And—well,
535 I asked him, "Tell me something about Germany." "Well," he said, "there is not much to tell. There is a lot of"—"There is great"—now, what did he say now? Oh, "we had to hunger awful and all," he said, "and I was always ahead on my rationing cards and very seldom got enough to eat; that is, compared to what we get in this country; and I am very glad to get my juicy steaks as well as my coffee, things I missed completely in Germany."

Then he came to speak about the German people in general. He said that the German people had a completely wrong conception about the American way of living, and the American people in general. He said part of the German people are inclined to believe that a great portion of the American people are back-slapping and tobacco-chewing rustics, and that another portion of the German people believe that they are supermen. "So while I was in Germany I have been trying everything to enlighten the German people what the Americans really are."

Q. Did he say he had much luck?—A. Well, he did not say that. He said he had tried it. Well, we spoke about the causes of the war and I at that time had read a book by a German historian, Ranke——

Q. He is a pretty good historian, too—

The COURT. This is taking so long, so please save your remarks until later.

536 Mr. MEDINA. Yes, Your Honor.

A. (Continuing.) And I quoted several passages from Ranke, you know, that the German Empire was founded too late, that the very stupid policy of the German Kaiser had more or less ruined Germany; if Bismarck had been in Germany another ten years most likely the World War would have been avoided and this one, too, and so we argued the point that the whole history was dependent upon single men, so Kerling did not seem to have much time—I believe he was there about three-quarters of an hour, and he said that he had to leave; he wanted to see his wife; his wife was waiting outside for him, so he stood up, he got

up and he said, "Werner, you pay the bill," and he parted and shook my hand and said, "I hope to see you some other time."

Werner Thiel and I remained there yet some more and I asked Werner Thiel about his experience or about his voyage——

Q. Let me interrupt. Did you have any idea that all these FBI men were around watching you then?—A. Well, I saw quite a few men there who looked suspicious to me, but I did not say anything to Thiel.

Q. All right. Now go right ahead and tell us what the rest of the conversation was.—A. And I liked, or rather I asked
537 Thiel to tell me about his voyage over to Japan and Russia and Germany, so he gave me his version about traveling to Japan. He spoke of the Japanese as very peculiar people. He told me one incident; that he and another German in Japan had traveled in a car and had collided with a truck driven by a Japanese. Now the German was good and mad and had to tell him a piece of his mind, and the Japanese climbed off his truck and came smiling and bowing towards the German, and the German could do nothing else but shake hands, and everything ended in peace, whereas if the Japanese had been a bully as the German, they most likely would have slugged each other. So then he told me about Manchukuo——

Q. About what?—A. About Manchukuo. He had passed through Manchukuo and Siberia, and told me about the vastness of the countries, and Russia in general, what a tremendous country it was, and about the great joy of his motlier and brothers and sisters when they had seen him again, and I believe by that time it was quarter past ten, and I told him I had to go home.

Oh, and then he said, "Wait a minute, you know I am going to give you the money." So he went to the men's room and he told me, "I have the money in a belt around my body and I am going to take it off." So I waited about five minutes and
538 he came back and we stood up and he paid the bill later and we walked out and walked towards Third Avenue, over 43rd Street, I believe it was, and he said, "Here is the money. It is in the belt," and I put it in my pocket.

No further words—when he said, "In case I need some money you better not put it all in the safe-deposit box. Leave some in your home in case I need something you do not need to go to the bank all the time." I said, "O. K."

Q. Did he on the previous evening tell you, or did he tell you on Tuesday evening, that you could take your $200?—A. Yes, sir.

Q. Which was it? Did he tell you that on both evenings?—A. He told me that on the previous evening and he told me that

this very evening, too; to take off my $200 which he owed me.

539 Q. Did he say anything on Tuesday evening about Norma except what you have already told us?—A. That was the only time he mentioned Norma; yes, sir.

Q. When you got that money belt with the money in it you were standing right out in the street there, in 43rd Street, were you?—A. That is correct; yes, sir.

Q. And what pocket did you put it in?—A. Well, I do not recall that. I put it in my pocket.

Q. And probably in the ordinary pocket that you have in the side of your coat?—A. That is correct; yes, sir. I believe it was. I don't recall which pocket it was.

Q. When you had that in your pocket what did you then do?—A. Well, I suggested to him to have a cup of coffee. We went to Thompson's and we drank a cup of coffee there and got some pastry, and Thiel told me how glad he was to be back in this country. He said, "That is one thing I have been missing in Germany, American cigarettes and a good cup of coffee." And that is all I recall we had conversed there.

Q. Didn't you talk to him on that Tuesday evening at all about when you were going to see him again?—A. Well, yes; on that occasion you know when we left Thompson's we walked up and down in front of Grand Central station, and he asked me

540 when I would see him again, if I could see him again the next evening. I said no, I didn't feel like it; I didn't have time and I wanted to stay home and do some studying and some reading.

Q. Let me pause there and see about your work. On Tuesday evening you worked, didn't you?—A. That is correct; yes, sir.

Q. What was the schedule of your work in this licorice factory in Brooklyn on Wednesday?—A. It was also during the day.

Q. And you told him that you could not see him or did not want to see him on Wednesday, it would not be convenient for you, and so what arrangement did you make?—A. Well, I told him I could see him again Thursday evening.

Q. Did he have anything to say about that?—A. No; that is O. K., he said.

Q. It seemed all right to him?—A. Yes, sir.

Q. On Tuesday you have told us I think about how he asked you if you had written to Norma, and you told him that you had not?—A. Yes, sir.

Q. Did he say anything more to you on Tuesday evening about writing to Norma?—A. Yes; he said before he left "Don't forget to write that note to Norma."

Q. After you left him you went back in your room, did you?—A. Yes, sir.

541 Q. What did you do when you got back to your room?—A. I took the money belt and put it in my shoe box.

Mr. MEDINA. I would like to have that money belt, please.

(Mr. Correa hands exhibit to Mr. Medina.)

Q. I show you Defendant's Exhibit A [handing to witness], and ask you if you recognize that as the money belt that you received from Thiel?—A. Well, I don't recognize the belt, but I know it was of similar—I did not pay much attention to the thing at all.

Q. What I am coming to is, there was money actually in this belt?—A. That is correct; yes, sir.

Q. When you got it from Thiel?—A. That is correct.

Q. Did each one of these little compartments have the money in?—A. Well, as much as I do recall, there were a couple of them had money in, I don't think all of them.

Q. When you took it out of your pocket up therein your room you could feel that there was money in it, couldn't you?—A. Yes, sir.

Q. And it was much more bulky than it is now?—A. Yes, sir; it was.

Q. When you folded that up and put it in the shoe box I take it you put it there for some purpose?—A. Yes.

Q. Why did you put it in the shoebox?—A. Well, the
542 original purpose was to shine my shoes with it, as I had——it.

Q. Well, but when your had it with the money in there and you put it in there the night you got back from Thiel——A. I took the money out immediately.

Q. Oh, you took the money out immediately?—A. Yes.

Q. So as soon as you got the money out of it you took it and put it in the shoebox?—A. As much as I recall; yes, sir.

Q. What did you do with the money?—A. I put it in my drawer, the brief case of my drawer.

Q. The next morning did you do anything about that money?—A. No; not the next morning. The next morning I went to work, and in the evening——

Q. The next morning was Wednesday, wasn't it?—A. That is correct; yes.

Q. And when you got back from work what did you do?—A. Well, I went to a restaurant to eat and came back and listened to the radio, and finally I counted the money, and I found it to be——

Q. This Wednesday night you counted the money?—A. Correct. I found there was $3,640 in it.

Mr. MEDINA. May I have that little sheet of paper with the denominations on it?' [Mr. Goodkind hands exhibit to Mr. Medina.]

543 Q. I show you Government's Exhibit 66 [handing to witness]. Is that the little memorandum that you made Wednesday night after you counted the money?—A. Yes; it is.

Q. What did you make that out for?—A. Well, I wanted to show Werner the exact amount of the money, how much was in there, and also deduct the $200 which he owed me.

Q. You wanted to have a little memorandum?—A. That is right.

Q. To show him the exact situation?—A. So there was no mix-up, to show him what was his and what was mine.

Q. You intended to give Thiel this memorandum, did you?—A. Yes, sir; I did. That is why I carried it with me.

Q. I do not think the jury understands yet about your carrying it with you. What did you do with it after you wrote it out?—A. I put it in my pocketbook.

Q. Put it in your pocketbook?—A. Yes, sir; as I intended to see Thiel, Werner Thiel, Thursday evening.

Q. And I suppose that later, after you were arrested, the FBI men took this out of your pocketbook?—A. That is right.

Q. Did you write this part on the back of this in your own handwriting?—A. Yes, sir; that is my handwriting.

Q. And where it says "Witness, John G. Willis, FBI,
544 NYC," did you see him put that right on there at the same time?—A. Yes, sir; I did.

Mr. MEDINA. With Your Honor's permission I would like to call this to the attention of the jury. (To jury.) Gentlemen, you probably remember this little slip. It has the indication seventy-one 50's, five 20's, ten 2's, and then the calculation with the deduction of the $200 there. You see $3,670 minus 200, leaving 3,740, and the notation, "Eight gold notes."

Then I would like to read to you what is on the back here. This is in Cramer's handwriting, put on there in the presence of Mr. Willis: "August 12, 1942. I hereby identify the writing on the back of this page as my own writing. The figures were made by me to indicate the denominations of each bill given to me by Werner Thiel on June 23, 1942, and the amount of each denomination." The total sum according to these figures amounted to $3,670." Then it is signed "Anthony Cramer," and over at the left, "Witness: John G. Willis, FBI, N. Y. C."

By Mr. MEDINA:

Q. After you got through doing the counting of the bills and making that memorandum Government's Exhibit 66, did you do anything else that Wednesday evening, the 24th of June?—A. No;

I remained in my room and did some reading, listening to music.

545 Q. Now I have an idea that was the evening you wrote the letter to Norma Kopp.—A. That is correct.

Q. Am I wrong about that?—A. Yes, sir; I did write that.

Q. So the same Wednesday evening you wrote the letter to Norma?—A. Yes, sir; I did.

Q. I show you that letter, Government's Exhibit 75, which includes both the letter and the envelope and the translation [handing to witness], and ask you if you can identify that as the letter you wrote to Norma?—A. Yes, sir; that is my letter.

Q. And do you remember this handwriting that you put on the back of the envelope?—A. Yes; that is my handwriting.

Q. And it says, "Witnesses: M. P. Griffin, John G. Willis."—A. That is right.

Q. Those were the two FBI men who witnessed your writing that on the envelope, weren't they?—A. That is right.

Q. Here on the letter itself—is this also your handwriting and your signature?—A. Yes; it is.

Q. The witnesses are N. P. Griffin and John G. Willis, the FBI men?—A. That is correct.

Mr. MEDINA. With Your Honor's leave I shall read this to
546 the jury. [To jury.] Although this letter has been read before, I think it will help the continuity if I read it again. It is quite short. "New York, June 24. Dear Norma: Thank you very much for your dear letter. Since I can well imagine that out there in the country there is not too much variety I shall not leave your letter unanswered. I thought that perhaps you were going to come Sunday, since Herman Tisch told me that you had planned to come Sunday. Perhaps I misunderstood him. When you do come don't waste any time looking me up immediately, because I have great news, and at the same time a pleasant surprise for you. Now you will probably start to guess what this might be, but I shall have to let you sit on pins and needles for the time being. So, Norma, guess away and look forward to news of the most sensational nature and when you come I want you to tell me the result of your guesses. Write me immediately if you are coming so I can be home. In th meantime best regards from Tony."

Now the envelope has on the back in Cramer's handwriting, "August 10, 1942. I hereby identify the handwriting appearing on the other side of this envelope as my own," and he signs it "Anthony Cramer," and that is witnessed by the two FBI men, Mr. Griffin and Mr. Willis.

Then the letter itself, which is all in German; at the bot-

547 tom of it he has again written here, "I hereby identify this as my handwriting in this lettet." Signed, "Anthony Cramer," and again witnessed by FBI men Griffin and Willis, with the date August 10, 1942, at the bottom.

By Mr. MEDINA:

Q. Now I notice that that envelope in Government's Exhibit 75 is postmarked 12 o'clock noon June 25th. Didn't you even take the trouble to go out and mail it the evening of the 24th?—A. No, sir. I wrote it, as much as I do recall, and was to take it along in the morning.

Q. You wrote it, put in the envelope, and said to yourself, "I will take it in the morning"?—A. That is correct.

Q. When you went out in the morning did you in the course of the morning drop it in the mailbox somewhere?—A. I don't recall it specifically, but I must have.

Q. You must have.

Mr. MEDINA. The postmark, I may say to the jury, is 12 M., which I take it is 12 noon June 25th.

Q. Now that brings us to Thursday, doesn't it?—A. That is correct; yes.

Q. Thursday is the 25th. What did you do after you got up on Thursday? A. I went to work, to my place of work.

548 Q. No; I do not think you are right about that. I think you went somewhere else when you left your home Thursday, and I do not want you to get it mixed up.—A. Oh yes; that is correct.

The COURT. Mr. Medina, I do not think it is quite proper for you to suggest the proper answer to the witness. These details may or may not be important, but I think it will be much better if you avoid that.

Mr. MEDINA. I am very sorry, Your Honor. I thought everybody knew it was Thursday morning he went to the Corn Exchange Bank and there was no dispute about it, but I will be sure not to do that.

The WITNESS. Yes; I was mistaken. I thought it was Wednesday. Thursday morning. I did not work on Thursday.

Q. So I say—and I did not want to put any words in your mouth—merely tell us what you recall about Thursday morning.—A. Yes, sir. It seems I did not have to work that day as my shift was going to be from Thursday evening to Friday morning. I went to the Corn Exchange Bank and deposited the money.

Q. Now when you went out of your room to go around to the Corn Exchange Bank did you have the belt Defendant's Exhibit A with you?—A. No, sir; I had that deposited or thrown into my shoe box.

549 Q. You had put that in the shoe box and you left it in the shoe box?—A. That is correct. I put the money in my pocket.

Q. So that when you left your room you did not have the belt, Defendant's Exhibit A, with you?—A. No, sir.

Q. But you did have the money?—A. I did have the money; that is correct.

Q. Now did you have anything else with you?—A. Well, yes; I had a check with me from Hubert Thielmann. I wanted to deposit some money in my name at the bank.

Q. That was a check for $10 that Hubert Thielmann, as you testified this morning, had sent *on* on account of his indebtedness?—A. That is correct; yes, sir.

Q. Now let me go back. There you were Wednesday night counting over $3,670 in bills, right?—A. Yes, sir.

Q. Did you have any money of your own in your pocket as you were there that Wednesday night?—A. Yes, sir; I did.

Q. Did you count that too to see exactly how much it was?—A. No, sir; I did not count that.

Q. There was no occasion for that, was there?—A. There was no occasion for that, as I had marked the exact denominations as well as the sum of the money down, and that gave me clarification.

Q. But the fact was that you had some money of your
550 own in your wallet and in your change pocket, but you did not take the trouble to count exactly how much that was?—A. That is correct; yes, sir.

Q. Before you started for the bank, that is for the Corn Exchange Bank Trust Company, did you take any part of that $3,670 and separate it from the rest before you left your room?—A. Well, of that I am not quite sure. I do recall that I put some money in a book, "Knowledge of Music" it is entitled, but I am in doubt whether I did it first or did it later. I do not recall that.

Q. As I understand, what you are trying to say is that there was some time when you separated some of this money, but you are not sure whether you did the separation in your room or whether you did the separation over in the bank; is that what you mean to say?—A. Yes, sir; I am not sure about that.

Q. But you are sure I take it that there was a certain amount of money that you took out of the pile of bills and kept out the rest of the bills that you left in the safe-deposit box?—A. Yes, sir.

Q. Now will you tell the jury what your recollection is about the bills you took out, how many there were, the denominations, and all that?—A. I do not recollect very accurately, but I do know that I separated $150 in the safe-deposit box as be-
551 longing to me, and the rest of the money, I do not know the exact amount, which I put into the box, but I have taken

I believe it was $160 and put these $160 in a book of mine. It has always been my custom to put money which I kept in my room in a book, and at the same time when I deposited this money I deposited $40 in my safety account.

Q. Let me take that up, step by step, Mr. Cramer, so we won't get it confused.—A. Yes.

Q. You may be right, perhaps we have to take it all together. There was some money that you deposited in the bank that morning, wasn't there?—A. Yes, sir.

Q. Perhaps if we stick to that first it will help clear it better than anything else? How much did you deposit in the Corn Exchange Bank that day according to the deposit slip? What was the full amount covered by the deposit slip?—A. Do you mean money deposited into my savings account?

Q. Well you said that you made a deposit in the Corn Exchange Bank in your account, didn't you?—A. Yes, sir.

Q. That is, the account that I have reference to.—A. That was $40.

Q. Let us see if it was. Do you remember making out a deposit slip?—A. Yes, sir; it was.

Q. You know these deposit slips have little printed matter on—Bills, checks, coin, and so on?—A. Yes, sir.

552 Q. Now I want the total amount of the deposit slip.—A. $40.

Q. Do you include the $10 check from Hubert Thielmann?—A. Yes, sir; I also include that. Yes, sir.

Q. That is part of the $40?—A. Correct; yes, sir.

Q. So that there was a $10 check from Thielmann and there was $30 besides?—A. Yes, sir.

Q. Was that $30 part of the money that you took out of this $3,670 of Thiel's?—A. The $20 bill.

Q. So $20 of it went to the bank with the deposits?—A. That is correct.

Q. How about the other $10, where did that come from?—A. That was money I had saved up.

Q. That was part of the money you had with you and did not get from Thiel at all?—A. No, sir.

Q. If we take $20 from $3,670 we get $3,650 that would be left; don't we? I will come over there so you can see this addition. You see you said a $20 bill you took out of that lot, so there was $3,670 and you take $20 off and that leaves $3,650.—A. Yes, sir.

Q. Did you do anything with any part of that $3,650 except putting it in the safe deposit box?—A. Well, $160 I had taken and put into a book that money.

Q. So you say now that $160 of that you took and put in a book?—A. That is correct.

553 Q. Did you take that $160 out before you went over to the Corn Exchange Bank?—A. Well, I don't recall that. I do—not know. I could not be sure of that.

Q. You are not sure about that?—A. No.

Q. If we take that out that leaves $3,490, doesn't it?—A. That is correct.

Q. That $160 you put in that book was all Thiel's wasn't it?—A. Yes; it must have been.

Mr. CORREA. Will you keep your voice up, Mr. Witness, please? Keep your voice up so we can hear you.

Mr. MEDINA. I will get back over here. I will be very glad to do that, and if I need to go up there again I will do it.

Q. Was that $160 you put in that book all Thiel's?—A. Well, I am not quite sure about this whole money business. I do know I have made a memorandum and this memorandum was always the guiding thing to me, because I knew exactly this is mine and the rest Thiel's. So some of the money I had may have been mixed up with the money I got from Thiel; but that was of no consequence, as I knew exactly how much Thiel had to ask from me.

Q. From this memorandum Governments' Exhibit 66?—A. That is correct.

554 Q. When you got over there to the safe deposit box you went in there with a view to putting this money in the box, didn't you?—Yes sir.

Q. You did not have anything else you wanted to put in that box, did you?—A. No, sir.

Q. Did it occur to you that you ought to take this money belt Defendant's Exhibit A and put that in the same deposit box, too?—A. No; that thought never occurred to me.

Q. If you wanted to conceal it anywheres the safe deposit box would have been a good place, wouldn't it?—A. Yes, sir.

Q. When you got in there to the safe deposit box I suppose you opened the little space where your box was and you took the box out and went into one of the little private rooms?—A. Yes; I did that.

Q. Now tell the jury exactly how you arranged that money in the box.—A. Well, as much as I do recall I put the $150 which was mine of this money into such a position that it could not get mixed up with the rest of the money, and then there were I believe five or six or seven gold notes of which I was in doubt whether that was valid money or not, so I was going to tell Thiel, "You have some money which may not be valid any more, that is why I kept them separated."

555 Q. And you have heard Mr. Willis's testimony, haven't you, that most of the money was in the envelope?—A. Yes, sir.

Mr. MEDINA. May we have that envelope, Mr. Willis, that big brown envelope with the name of that brokerage house on [envelope handed to counsel]?

Mr. MEDINA. If Your Honor please, this morning I had a little talk with Mr. Correa and I think we are both agreed that if we had a short recess in the middle of the morning and afternoon sessions it would be easier for us, *of* Your Honor feels that it is right that we should do that.

The COURT. I think very frequently you can save time.

Mr. MEDINA. May we do that as the trial progresses, just take about ten minutes in the middle of the morning and the afternoon sessions?

The COURT. You may take a recess now.

(Short recess.)

Q. Now, Mr. Cramer, you put a certain amount of that money in this brown envelope, didn't you?—A. That is right; yes, I did.

Q. Where did that come from?—A. Well, that was an envelope that was in the box. I had bought securities and the firm
556 from which I bought the securities had furnished me this envelope to put them in there.

Q. This envelope had on it "Steiner, Rouse & Company, 25 Broad Street, New York City." Is that the name of the brokerage house from whom you bought those securities?—A. Yes, sir.

Q. I notice there is impressed on this envelope with a rubber stamp two dates, June 30, 1941, and July 3, 1941, and there is also a memorandum in pencil, "6-30-41" meaning June 30, 1941, and I ask you whether June 30, 1941, is about the time that you bought these securities through Steiner, Rouse & Company?—A. That is about the time; yes.

Q. And when those securities, whatever they were, were delivered, they were delivered to you in this envelope which is marked "Registered mail"?—A. Yes; they were.

Q. And did you at some time after June 30, 1941, dispose of those securities, sell them, I mean?—A. I sold them; yes.

Q. And so after you sold them and disposed of them you did not have any more securities left in the box, did you?—A. That is correct, no more.

Q. And at that time all there was left in the box was this envelope?—A. Correct; yes, sir.

Mr. MEDINA. I have arranged with Mr. Correa, through
557 his courtesy, to place upon the record a concession which will save me calling a couple of witnesses, and that concession is that on or about June 30, 1941, the defendant Cramer purchased certain securities from Steiner, Rouse & Company, and that later, and long prior to June 1942, those securities were disposed of by the

defendant through the same brokerage house of Steiner, Rouse & Company.

Mr. CORREA. Yes; if Your Honor please, that is stipulated. We do not especially concede relevancy or materiality, but I do not raise any objection on those grounds either. It is stipulated that that is the fact. If it is important at all we can furnish the date when the securities were disposed of.

Mr. MEDINA. I do not think it makes any difference, and we merely make this stipulation to save the trouble of calling the man from Steiner, Rouse & Company whom we had under subpoena.

Q. Without going into the exact details about those securities, approximately what did they come to? Something like $500 or $600?—A. I do not know the exact amount. I believe from $400 to $500.

Q. $400 to $500 worth of securities?—A. Yes, sir.

Q. And after you sold them you used the proceeds for some purpose or other, did you?—A. Partly yes; and partly I loaned money to my friend.

558 Q. When you say loaned money to your friend, you do not mean Mr. Thiel?—A. No, sir.

Q. It has nothing to do with Mr. Thiel at all?—A. No; Mr. Henke it was.

MR. MEDINA. I offer in evidence the envelope.

Mr. CORREA. No objection.

(Marked "Defendant's Exhibit G.")

MR. MEDINA. With Your Honor's permission I should like to not only show this Exhibit G to the jury but at the same time the Government's Exhibit 72 from the Corn Exchange Safe Deposit Company.

Now you gentlemen will observe this is the envelope where he put most of the money in. It was lying in the safe deposit box. It was the only thing in the safe deposit box when he went around there. You will notice down here it has "Registered mail" and these little rubber stamps, June 30, 1941, first notice, and the second July 3, 1941. That exactly coincides with this date of this opening of this box, July 3, 1941, which is the time that he opened the box at the Corn Exchange Safe Deposit Company. It just exactly coincides with this other paper. I will leave these here so if any of you gentlemen want to look at them, you may do so, and then they can be passed back.

559 Q. Now you got over there to the safe deposit box, and as I understand your testimony all there was in the box when you got over *there* was this envelope, Defendant's Exhibit G?—A. Yes, sir.

Q. Nothing else in there?—A. Nothing else in there.

Q. Now prior to this arrangement that you made with Thiel,

had it been your intention to simply let the yearly rental of that box go and lapse, as we lawyers put it?—A. Well, I intended to put my citizen papers in there and other valuable papers.

Q. You did not have any occasion to keep that safe deposit box or you would not have had any occasion to keep it unless you put this money of Thiel's in it, would you?—A. Yes, sir. Well, I did not know whether I would lapse that or not, as I have my citizen papers and my other papers and I might have rented the box again.

Q. So your statement is, I take it, that you did not think of it one way or another. You may have renewed it and might not?—A. That is absolutely the meaning of it; yes.

Q. When you got over there that Thursday morning in June, there was this envelope in the bottom of your little box?—A. Yes, sir.

Q. Do you remember how much you paid to rent that box?—A. $6.00. Yes, sir.

560. Q. Well, it says $5.00 on the Government's exhibit here?—A. Does it?

Q. Rent, $5.00.—A. Then it must be five.

Q. Maybe there was some tax added to that, I do not know.—A. A dollar for the keys, I believe.

Q. In any event, your recollection is that it cost you $6?—A. That is my recollection: Yes, sir.

Q. Now when you got in there with the money in your pocket, how much of it did you put in this envelope, Defendant's Exhibit G. There you are in the little private room in the safe deposit company with this envelope and the money in your hand. How much did you put in the brown envelope?—A. Well, I am unable to tell you that. I do not know. As I stated before, you know my only memorandum or my synopsis about the whole thing was the fact that I had written down the money that belonged to Thiel and so the rest was mine, so I never would have gotten mixed up.

Q. So you could not exactly say how much you put in the brown envelope?—A. No.

Q. Can you say this, that you put most of the money in the brown envelope?—A. Yes, sir; I did.

Q. That left a certain number of bills that you did not put in the brown envelope, Defendant's Exhibit G?—A. Yes, sir.

561. Q. And I ask you if you have any recollection of how you arranged them: these other remaining bills, in that box?—A. As I do recollect, I had three $50 bills piled in a corner and four or five gold notes piled in the other corner, and the rest of the money was in the envelope. That is my recollection.

Q. Well, I don't want to seem to be stupid about it, but I do not quite understand why where there were eight gold notes, you

should put four or five of them in one pile and the other three or four inside the envelope. Was there some reason for that?—A. No; but my recollection is very vague about this subject. I am not positive about it.

Q. You know Mr. Willis testified that as he looked at that box when it was opened, a certain amount of money was in the brown envelope and that there were four $50 bills in one corner and five $50 bills in the other, but he could not be sure which corner had the four, and which corner had the five bills. Do you remember that or don't you remember his testifying?—A. I do remember his testifying to that.

Q. Does that help you at all to tell the jury how you piled them up in there?—A. No. That is a thing that has completely slipped my mind. I do not know.

562 Q. In any event, there never was any doubt in your mind that your arrangement with Thiel was that you were to keep $200 for yourself?—A. Well, that was the main object of my memorandum; to show what was his and what was mine.

Q. And that clearly appears on this memorandum, Government's Exhibit 66, doesn't it?—A. That is correct.

Q. And when you left the safe deposit place what did you then do?—A. I went to bed because I had to work in the evening. This was Thursday.

Q. And I suppose you mailed this letter to Norma. It is postmarked noon, so you probably mailed that after you left the safe deposit box?—A. That is correct; that is the time.

Q. Now, what time did you get up?—A. About five o'clock, as I do remember, and I went out to eat, and it was about quarter to six when I came back, and I listened to the radio, to music, and sat down and read. By about 7:30 I left my house——

Q. That was the night you were to meet Thiel again, wasn't it?—A. That is right; yes, sir.

Q. And you were to meet him where?—A. Thompson's restaurant.

Q. All right. Now go right ahead and tell the jury what you did that Thursday evening.—A. So I went down there and it was about five minutes to eight when I arrived in Thompson's.

563 I got a cup of coffee and some food, some pastry, and I sat down and drank my coffee and waited.

Q. Without going into every little detail, the fact is that you went down there and waited around and Thiel did not show up?—A. That is correct.

Q. Is that about right?—A. Yes.

Q. And then you went back home?—A. No; not immediately. I thought Thiel might have misunderstood me; that he might per-

haps come around at nine o'clock, so I went to the park near the Library, the City big library, and about five minutes to nine I went back into Thompson's restaurant and I waited another five or ten minutes, and then I knew Thiel would not come, so I went back home again.

Q. Now you did not have any suspicion that he had been arrested in the meantime, I suppose?—A. Well—I had a suspicion that there might be something wrong, but I did not definitely form the thought that he might have gotten arrested. Then again I thought, well, not much can happen to him if he is getting arrested so the next evening, Friday evening—that night I worked in my old place and came home and it was about nine o'clock and slept again for a few hours and in the evening I went down again. I thought perhaps Thiel has misunderstood me altogether, and it comes Friday evening——

564 Q. So this is Friday evening and you go down to Thompson's again?—A. Yes, sir; Friday evening I waited another ten minutes and then I began to have my doubts about what might have happened to Thiel. I thought—then the thought definitely occurred to me, perhaps Thiel is arrested, but I did not pay any further attention to that.

Q. Did you think what he might be arrested for?—A. No, sir. If he was arrested, I thought nothing can happen to him. He has come to this country with no ill purposes, as much as I knew, and the thought I was thinking, all they can do is put him in a concentration camp as an alien. So that same evening Norma Kopp came. I believe it was quarter to nine. I was in my room reading and the doorbell rang and Miss Norma Kopp showed up.

Q. Yes. Now tell the jury your entire conversation that evening with Norma?—A. Well, the first thing I did ask Norma was, "What do you think has happened?" Well, she did not know. So I let her guess, but she did not have the slightest idea.

Q. Well, did she indicate to you in any way that she had received your letter?—A. Oh, yes. She told me that, and she was very anxious to know what had happened. "Well," I said, "Werner is back." Well, she was all excited and jittery. "It cannot

565 be. I do not believe that." I said, "I have seen him."

"Well, but how is it possible," she said. "Well," I said, "all I can see is that he has come by submarine. He has not told me so, but that is what I deduce from his manners," and then she said, "Well, I am glad I did not go back to Germany now. We are together again."

Well, we talked. I told him—told her, rather, pardon me—that Eddie Kerling had come along with Werner, so that did not seem to arouse much interest in her, and she did not ask any questions, and I told her he had given me three and a half thousand dollars and

she asked me, "Where did he get the money?" and I said "I have not got the slightest idea where he got it," and we kept on talking and she asked me the question, "Oh, if you think he has come by submarine, where have they come from?" I said "As much as I know from Werner, he mentioned Jacksonville, and that is as near as I have come to his coming to this country." And I told her Werner had promised me to give a full account of his whole story, and a good story at that, he told me. She mentioned "I wonder how they have come," and I said, "If they have come by submarine they have either swam to shore or they have used a rubber boat."

566 And that was about the whole conversation I have had with Norma Kopp about this particular thing. She was very glad Werner had come back and she started singing and said again and again, "I am glad Werner is back, and everything will be all right. I never believed we would get together again."

Q. Was anything else said between you and Norma that evening?—A. No, sir; nothing pertaining to his coming to this country.

Q. Now what happened after that?—Did she go home or go out somewhere or what?—A. Well, I said to her "Let's go to the Kolping House and have a beer. You can see your acquaintances there and friends." She had a few friends there and she was very glad to accommodate, so we went to the Kolping House and I played a couple games of chess and drank a couple glasses of beer and she sat around with her friends and—oh, I forgot to mention that I told her that I had had a date with Werner Thiel on Thursday evening but that he had failed to show up, and that I had been down to Thompson's on Friday evening, too, and I did not see him at all, but I did not convey any of my suspicions to her that he might have become arrested. I did not say anything of that to her, not to frighten or make her feel bad at the time she was in New York.

"And by about 10:30 I told her that I was about to leave, going home again, and she said, "Wait a minute, I will be with
567 you. I will go along with you. I want to go home, too."

So I accompanied her to 87th Street corner Second Avenue, and she said, "You know, but how can we meet him now when he has not shown up." "Well," I said, "the only thing to do now is to write him a note. I tell you what I will do, Norma. I am going to write a note tomorrow morning and I bring it down to the Hotel Commodore, and write him to meet us tomorrow afternoon at four o'clock, which is Saturday." So "that is fine," she said, "we will do that, and I will come around at three o'clock and we will go together."

Q. Now before you get to the next day, had you told her any-

thing about his using this name of William Thomas?—A. Oh, yes. I have told her that.

Q. Did you explain to her why he was using that?—A. I told her according to his version, he had taken that name not to get into trouble with the draft board, and that is the whole explanation why he used the name of William Thomas. So the next morning I wrote a letter——

Mr. MEDINA. Now may I have the one from the wastebasket [paper handed to counsel].

Q. Now the next morning when you wrote this letter, were you up in your room?—A. Yes, sir.

568 Q. Go ahead and tell the jury about it?—A. Well, I sat down in the morning after breakfast and did as I had promised Norma and wrote the letter, and by about 9:30 I left my room——

Q. I don't want to have you go quite so fast as that. I have here two papers. Now these are both in your handwriting, aren't they?—A. Yes; they are.

Q. What is this first one, Government's Exhibit 56?—A. Well, that is a note I have written to my—to Werner Thiel.

Q. That is not the one you left down at the hotel, is it?—A. I don't think it is, but I am not quite sure about that.

Q. Well, you have now in your hand the one you left in the hotel, Exhibit 67, and I want you tell the jury what is this other one?—A. That is a letter I had written but I disliked the handwriting on it so much—I cannot recall, but I tore it up and wrote this one.

569 Q. Well isn't it a fact that you sat down and you wanted to formulate the letter, and you wrote it out here and then you copied it out afterwards in the form that you later took down to the Commodore?—A. No.

Q. That this was just a kind of rough draft?—A. It was not a copy. I disliked the writing on it, I believe, so I thought I would write it over in somewhat more becoming handwriting. I believe that is the reason.

Q. Didn't you actually finish this first one?—A. Didn't I? I don't know.

Q. I do not see any signature on it?—A. Yes; there (indicating) is a signature.

Q. Is there?—A. Anthony Cramer.

Q. Now let us see. As a matter of fact the signature that you see there is right under the following words, is it not: "August 10, 1942"—no, I beg your pardon, you are right and there is another signature up here, isn't there?—A. Yes, sir.

Q. That I had not seen at first. Whatever it was, after you

wrote this first one did you not have this first one in front of you when you wrote the second one?—A. Well, I may have had that. I am not positive about that?. The fact remains that I disliked the writing of the letter, I remember that, and tore it up.

Q. When you tore it up you can see from the way it
570 appears here just where it was torn, can't you? You see it has been pasted together again.—A. Yes; just once.

Q. When you tore it up that way, which looks to me like tearing twice, once across and once the other way—what did you do with it?—A. I think it deposited it in the wastebasket, as much as I remember.

Q. You use that phrase "deposited it in the wastebasket".—A. Threw it.

Q. Threw it in the wastebasket?—A. Yes, sir.

Q. Did you do that for the purpose of concealing it in any way?—A. No; I never thought of that.

Q. And then did you write out afterwards this second one, Exhibit 67?—A. That is correct; yes, sir.

Q. What did you do with this second one Exhibit 67?—A. I put it in an envelope and addressed it to Mr. William Thomas, Commodore Hotel, and put that in my pocket with the intention to deliver it personally.

Q. This envelope that is annexed to Exhibit 67, is that very selfsame envelope, isn't it?—A. Yes; that is the one.

Q. That is the one you put it in?—A. Yes, sir.

Q. I don't suppose you had any reason to write it out on this kind of paper?—A. No, sir.

Q. You just happened to have it handy and wrote it out on that paper?—A. That is correct; yes, sir.

571 Q. What did you do with it when you had it in the envelope there?—A. I went down town to the Commodore Hotel and went into the entrance, and I must have been wrong. As I turned around—I went inside and turned around again, because I found out that was wrong, because I wanted to deliver the letter, and in turning around and walking out I bumped into a gentleman which I later on learned was an FBI agent Mr. Willis.

Q. You bumped right into Mr. Willis?—A. Yes.

Q. Did you go right in in a few minutes?—A. I went right back in at the next entrance and delivered the letter to the desk girl.

Mr. MEDINA. With your Honor's permission I would like to comment on these two documents. [To jury:], Gentlemen, this first one is the one he tore up, and you can see what he says, that the handwriting is not quite as smooth as it might be. It seems identical with that one, or substantially so. It says, "Saturday, June 27th. Hello Bill: Can you make it possible to meet me at

4 p. m. today? I will be at Thompson's at this time with Norma. You know the place, right next to the entrance of Grand Central. If this is not"—and then the "to," and he crossed out the "to"—"if possible phone"—and then he has "Atwater" written and copied over, "Atwater 9-9561 at 7 p. m. tonight."

572 By Mr. MEDINA:

Q. Now that was the phone number of the Kolping House, wasn't it, Mr. Cramer?—A. That is correct; yes, sir.

Mr. MEDINA. And then you see at the bottom here "August 10, 1942. I hereby identify the handwriting appearing on this letter as my own." Signed Anthony Cramer, and witnessed before Mr. Griffin and Mr. Willis, the two FBI men. And there is a little note here that I think was placed on there by one of the FBI men which says "Found in wastebasket."

This other one, which is the one actually delivered down there, there is the envelope, a plain envelope that has on it "Mr. William Thomas, Hotel Commodore, City." There are some pencil marks that look as though they have been put on by the hotel clerk. Then on the back "August 10, 1942. I hereby identify the handwriting appearing on the opposite side of this envelope as my own." Signed Anthony Cramer, witnesses Griffin and Willis, the FBI men; and here is the note, which is the same as that other one and I won't bother reading it to you. And again "August 10, 1942. I hereby identify the handwriting appearing on this letter as my own." Signed by Anthony Cramer and witnessed by Mr. Griffin and Mr. Willis, the two FBI men.

573 By Mr. MEDINA:

Q. Now as I understand it you had told or you had discussed with Norma the previous evening the writing of this letter?—A. Yes, sir.

Q. To be addressed to William Thomas, knowing that that was Thiel?—A. Yes, sir.

Q. After you left the Commodore what did you then do?—A. I went back home again and remained at home until about 2 o'clock; and by that time Norma Kopp turned up. She was all dressed up, you know, ready to go with me down town to see Werner Thiel. And I believe it was a quarter past 3 when we left our home.

Q. Was she still claiming that she would not believe that he was here?—A. No; she never claimed that.

Q. You said when you first mentioned it to her she would not believe it?—A. Yes; the first few moments, but she knew me as a trustworthy person and knew she could trust my word.

Q. Aside from what she knew of your being a trustworthy person, did she believe Thiel was really here?—A. Yes; she kept on

repeating "I am so glad I did not go back to Germany, now we are together again."

Q. You say that Saturday she turned up all dressed up to go down with you and meet Thiel?—A. Yes, sir.

574 Q. What did you do?—A. We left my home at quarter past 3 or 20 past 3, I am not sure of the time, and arrived down at Thompson's a little before 4 o'clock. We sat down and had a cup of coffee and some cake and we were discussing whether Werner would turn up or not, and I said "I hope he will come."

Q. Did you tell her all about delivering the note?—A. Yes; I told her that I delivered the note and that I had given the letter to a lady which I believe to be the desk girl, and that I hoped he would receive the letter. So we waited there and she was very jittery and very nervous, expecting Werner, and I believe we sat there 20 minutes and I said, "Well, I believe it has no use—it is of no use to wait any longer, he must have been prevented to come, so you be in the Kolping House tonight and if he should phone up you can receive his phone call." Yes; she would do that then, as I had stated in the letter that Werner should phone up at 7 o'clock and that she would be ready to receive his word if he should telephone. So she went to the Kolping House, and I went back home again and stayed at home until a quarter to 9 and went to the Kolping House.

Q. What were you doing home there in the meantime?—A. Well, I was reading and listening to music and the radio, and doing some work drawing.

Q. What do you mean drawing?—A. Oh, I was taking all 575 by myself a course in mechanical drawing.

Q. You were taking a course in mechanical drawing?—A. That is correct.

Q. And you took this time to do a little more drawing with your instruments there?—A. That is correct.

Q. Then you went over to the Kolping House?—A. I went over to the Kolping House, and the first thing I asked Norma when I saw her if she had received word from Werner. She said no. By that time she seemed a little troubled. "I wonder what has happened to Werner," she said. I told her everything will be all right, there is no use worrying about it. So I had met a friend, and we played a couple of games of chess, and we sat down again at the table, and I believe it was 10:30 when a couple of men came in and asked for Cramer, and one of the men asked me to come outside.

Q. And that is when they took you from the Kolping House down here to the FBI room in this building?—A. That is correct.

Q. When they first started to question you here do you remember who it was was doing the questioning?—A. I believe Mr. Ostholthoff or Mr. Willis, I am not positive about it. I was rather excited.

Q. You were a little bit excited then?—A. Yes, sir.

576 Q. You say it was Mr. Willis, Mr. Ostholthoff and perhaps some others who were questioning you?—A. Well, there were four men if I recall correctly altogether, and everyone did a little questioning.

Q. Now is it a fact that when they first questioned you you lied to them?—A. I did; yes, sir.

Q. And you are charged here with having told certain specific untruths.—A. I did; yes, sir.

Q. And I want to ask you whether you told them these things. That you told them first that Thiel's name was Bill Thomas. Did you tell them that?—A. That is correct; yes, sir.

Q. And that you told them also from March 1941 until June 1942 Thiel had been working in a factory out on the West Coast?—A. Yes; I don't deny that.

Q. And that you told these men that Thiel had not been out of the United States for that period?—A. Yes, sir.

Q. And that you told them that the money belt that Thiel had given you contained only a couple of hundred dollars that Thiel had owed you?—A. Yes, sir.

Q. And finally that the $3,500 in the safe deposit box belonged to you and no one else and had been obtained by you from the sale of your securities, and was kept there because you considered it safer than a savings bank?—A. That is right.

577 Q. What did you lie to them that way for?—A. Well, Werner Thiel—I knew Werner Thiel as a man who had had trouble with the Draft Board, and I did not know Werner Thiel as a man who he turned out to be later on, and I tried to protect Werner Thiel's identity because I knew he had had trouble with the Draft Board, and furthermore I knew he had money and that he was an alien, and I knew that his money would be taken away from him as an alien, and I tried to protect his interest as a friend. These were acts nothing but tributes to his friendship. I was completely unaware of his identity as the man he later on turned out to be.

Q. Did you tell these things for the purpose of shielding yourself?—A. No, sir; I was trying to shield Werner.

Q. Did there come a time later on that evening when you were taken into custody when you said something to the effect that you wanted to see Mr. Ostholthoff alone?—A. Well, yes. Mr. Ostholthoff told me "Cramer, you don't seem to realize in what a serious thing you have been involved." Well then it dawned

upon me that something might have been radically wrong. "Well," I said, "if that is the case I am going to tell all I know about it," and requested Mr. Ostholhoff to have the rest of the gentlemen removed out of the room, as I did not want to tell the story to all the men all together. Then Ostholthoff told me
578 "All right, Cramer, if you tell us the whole story this thing will not be mentioned at all, that you have lied to us, I promise you that." And then I told him the story I have told the FBI.

Q. What did you tell him?—A. Well, that Thiel had told me such and such, he had come to this country——

Q. Well, did you specifically admit to them that this fellow's name was really Warner Thiel and not Bill Thomas?—A. Yes; I did tell them that. Yes, sir.

Q. I would rather have you tell the jury in your own language what you told Ostholthoff.—A. I told him of my meeting with Thiel the first time, about the slip of paper I found in my room, and how I met Thiel the first time in Grand Central depot, and that I was thunderstruck to see him and asked him questions "How have you come over here, have you come by submarine?" And that he gave me a startled look, and later on smiled and said, "Some other time I will tell you all about it;" that then we had a conversation at the Twin Oaks.

Q. Did you tell him in substance, but without all the details, just what you have told the jury here today?—A. Yes, sir; I did.

Q. But not so elaborately?—A. No so elaborately; just told him a few things that I knew.

Q. Did you tell Mr. Ostholthoff that Thiel had told you
579 he was over here on a mission from the German government?—A. No, sir; I never told him that.

Q. Do you recall that after you spoke alone there with Mr. Ostholthoff he called the other men back and you were questioned further with the other men there?—A. Well, yes. Then the story as I do recall was in part told over again.

Q. He explained to the other men what you had told him and they had some more questioning, did they?—A. That is correct.

Q. Did there come a time the following morning about 11 o'clock, Sunday morning, when you were questioned further by Mr. Willis and some of these other men?—A. Yes, sir.

Q. Mr. Willis was there all the time except those few moments you were alone with Mr. Ostholthoff, wasn't he?—A. Yes, sir.

Q. Do you recall that on many occasions during the various times that you were questioned the FBI men asked you to write out certain things and sign certain papers?—A. Yes; they did.

Q. Do you recall whether or not some time on that day of Sunday, after you were arrested, that the FBI men pre-

579-A pared a statement for you to sign?—A. I know they wrote down what I told them.

Q. Perhaps I have not put it right. They wrote down, but didn't they have typewritten out——

Mr. MEDINA. May I have that statement, Mr. Correa, please?

The COURT. Mr. Medina, we have to adjourn.

(Adjourned to Tuesday, November 17, 1942, at 10:30 a. m.)

NEW YORK, *November 17, 1942;*
10:30 o'clock, a. m.

Trial resumed.

ANTHONY CRAMER resumed the stand.

Direct examination resumed by Mr. MEDINA:

Q. While Mr. Willis is getting that statement, let me ask you one or two questions. After you lied to these men the first few moments, or the short time that you were there that Saturday evening that you did lie, after that you told them the truth, did you?—A. Yes, sir; I did.

Q. Did there come a time when some one of these FBI men got a stenographer in and dictated something for you to sign?—A. Yes; the next day.

Q. And as a matter of fact you were questioned a good many times in the next few days or weeks after that by these FBI men, weren't you?—A. I was; yes, sir.

Q. And various papers and documents and things from your room were brought down and shown to you?—A. That is correct.

Q. Now is it a fact that every time the FBI men
581 asked you to identify some particular article as yours, that you freely and immediately identified it for them?—A. Yes, sir; I did.

Q. And if he asked you to write out something on a piece of paper that could be connected with that you did so, did you not?—A. Yes, sir.

Q. And when it came to these various writings of yours, when they were first shown to you did you freely and truthfully admit that they were yours?—A. Yes, sir; I did.

Q. And when the FBI men asked you to write out some little legend in your own handwriting identifying those letters or signatures of yours, did you do so?—A. Yes, sir; I did.

Q. Did you make any remonstrance at any time about making such writings as that?—A. None whatsoever.

Q. Now when on that Sunday morning, June 28th, the FBI men dictated this statement that you have spoken about, did they

do the dictating?—A. Well, I am not quite aware of the fact. They asked me questions and I answered them.

Q. They asked you questions and you answered them?—A. That is right.

Q. And then they would dictate and put it down in the statement?—A. That is correct; yes.

582 Q. And is it your understanding that if that statement was prepared that it included everything that they wanted to have in it?—A. Well, yes.

Q. As far as you could tell they had not left out anything, had they?—A. That is correct.

Mr. Correa. I object, if your Honor please, to leading on this line. Again we have the same thing we had yesterday, except that here I feel we are on a slightly more important topic and that counsel should not be permitted to put the answers into the witness's mouth. I object to any leading on this line.

The Court. It would be better not to lead at all, Mr. Medina.

Mr. Medina. I try not to, your Honor. Sometimes on matters that I do not consider controversial I do it merely to save time, but I shall try to refrain from any leading at all.

By Mr. Medina:

Q. I show you this paper [handing to witness]. Do you recognize it?—A. Yes; I do.

Q. What is it?—A. It is the statement I made to the FBI men on——

Q. Do you see your handwriting on it anywhere?—A. Yes; at the bottom of each sheet is my handwriting.

Q. Do you see any more handwriting on it of yours
583 besides the signatures that appear at the bottom of each page?—A. Well, there is typewritten description on there.

Q. No; I am asking you about your writing, and I do not want to show it to you myself. You look around and see if you find any of your handwriting on there except these signatures at the bottom of the page.—A. Yes; I do.

Q. How did they get on there?—A. Well, they asked me to put it in there, a few statements. I see one of them.

Q. You see them there?—A. Yes, sir.

Q. That is all I asked you about that. Now is it a fact that when that statement was typewritten out by the stenographer that it was brought back and given to you to read over?—A. Yes, sir; it was.

Q. And after you read it over did you yourself suggest adding those parts that are in your handwriting, or did somebody else suggest that?—A. No; someone else has suggested that to me.

Q. And how did that come about? Tell the jury just how that happened.—A. Well, to their meaning something was left out which might have been of importance, and they asked me to put it in there.

Q. And when they asked you to put it in did you put it in in your own handwriting?—A. Surely. Immediately.

Mr. MEDINA. I offer this paper in evidence.

584 Mr. CORREA. No objection.

(Marked "Defendant's Exhibit C.")

Mr. MEDINA. With your Honor's leave I shall read this to the jury. [To jury]: I am going to read this whole statement. It will take me a few minutes, but I wish to do it, and I hope it won't take too long.

(Mr. Medina read Defendant's Exhibit C to the jury, and during the reading at the point "trying to perfect a three-color fountain pen" the following occurred: Q. Now you forgot to tell us about that, didn't you?—A. I forgot all about that.)

Mr. CORREA. I object to that, "you forgot to tell us" as distinctly leading, and——

Q. Did you tell us about Dr. Viehaus?—A. No; I did not. I forgot all about that.

(Mr. Medina continues reading Exhibit C.)

Q. Mr. Cramer, are there some things in this statement that you did not mention in your direct examination here yesterday?—A. Yes; about the rumors.

Q. Without asking you to characterize what the same are, there are some things in here that you did not mention yesterday?—A. That is correct—yes, sir.

Q. I ask you the general question, is everything in this statement true?—A. Yes, sir; to the best of my knowledge.

585 Q. Prior to your arrest on the charge contained in this indictment, had you ever been arrested or accused of any wrongful conduct whatsoever?—A. No, sir.

Q. When you met Thiel at the Grand Central station on the night of June 22, 1942, did you know that he had attended a school for saboteurs in Germany?—A. Never knew it. Never heard of it; no, sir.

Q. Or anything of that character?—A. Nothing of the kind.

Q. Did you know or have any notion that Thiel had come to this country as a secret agent of the German Government for the purpose of doing various acts of sabotage?—A. No, sir; never heard of it.

Mr. CORREA. If your Honor please, I object to the question as embodying two questions in one, first, did he know, and second, did he have any notion. I think those two questions should be

put separately and not lumped so the witness may be sure to understand what he is being asked.

Mr. MEDINA. I shall be very glad to do that.

Q. Did you know at the time that you had these dealings with Thiel that he had come to this country as a secret agent of the German government for the purpose of committing various acts of sabotage?—A. No, sir; never did.

Q. Did you at that time believe that he had come here
586 from Germany to do any sabotage?—A. None whatsoever; never had the thought.

Q. During the period that elapsed between your meeting with Thiel at the Grand Central Station on June 22nd, and your apprehension by the FBI on Saturday night, June 27th, did Thiel ever tell you, or did you ever learn from any other source what he came to this country for?—A. No, sir; he never did.

Q. But you did not learn it from any other source?—A. Not from any other source.

Q. Is your answer the same as to Kerling?—A. Yes, sir.

Q. Did you at any time believe or have the slightest inkling that in doing these things to help your friend you might be aiding and abetting an enemy of the United States?—A. That thought has never occurred to me.

Q. Did you at any time have any purpose or intent to hurt the United States or to help its enemies in defeating this country?—A. No, sir; never.

Q. Did you at any time have any purpose or intent to adhere to the enemies of the United States and to give them aid or comfort?—A. No, sir; I never have.

MR. MEDINA. Your witness.

587. Cross examination by Mr. CORREA:

Q. All right, sir; let us go back to one of the earlier parts of your direct examination, Mr. Witness, and let me ask you concerning your membership in the Friends of New Germany. Yesterday on your direct examination according to my notes you were asked the question by your counsel, and I quote it:

"What was it that led you to pull away from that organization?" Referring to the Friends of New Germany. Do you recall being asked that question, sir?—A. I did not like the activities.

Q. No; do your recall being asked the question by Mr. Medina yesterday?—A. No, sir.

Q. Well, perhaps you recall your answer to the question. That may refresh your recollection.—A. Well, yes.

Q. You answered according to the minutes: "Well at that time there were quite a few things going on which I disliked.

Swindle—there was a money swindle that occurred in the Bund or Friends of New Germany." Do you recall that?—A. Yes; I do.

Q. Then your counsel reminded you in his next question that Mr. Willis had testified that you had told Mr. Willis that you had left the Friends of New Germany because you did not like
588 their marching around and their activities.—A. That was in connection with that.

Q. I am not interested in that, but I am interested in knowing your actual reason for leaving the Friends of New Germany.—A. Well, these are the reasons; that I disliked their marchings and activities, and the swindle at the same time when I belonged to the Friends of New Germany.

Q. Isn't it a fact, sir; the swindle is the real reason you left the organization?—A. No; it is not.

Q. Did you ever mention that particular reason to Mr. Willis in any statement made to him?—A. What reason, sir?

Q. The swindle.—A. I do not remember.

Q. Don't you know that you did not, sir?—A. I don't remember that.

Q. Well you did not mention it in the statement which has just been read, that is clear, isn't it?—A. It is; yes.

Q. And you did not mention it at any other time either, did you?—A. I could not tell you.

Q. That just slipped out yesterday, didn't it?—A. No; I would not say that. That is a fact.

Q. Did you take up the reason of marching around and radical activities when you gave the statement to Mr. Willis be-
589 cause it would sound better?—A. No; sir; it was a fact.

Q. By the way, were you an officer of the Hammond unit of the Bund?—A. Yes, sir; I was.

Q. What officer were you?—A. I was the secretary or treasurer. That is, I took care of the money.

Q. Secretary and treasurer?—A. No; just the secretary, taking care of the money.

Q. And you kept the dues for the unit?—A. That is correct.

Q. How long did you keep that office, sir?—A. Oh, about half a year.

Q. Between what dates, if you are able to tell us.—A. Well, I am not sure about that. It was I believe at the beginning of 1935.

Q. Now have you ever mentioned that to Mr. Willis or any other government agent, sir?—A. No, sir.

Q. In your statements about the Bund, or your membership in it?—A. I have not, no.

Q. This is the first time you mentioned that?—A. That is correct. I was never asked for that.

Q. Well, you were asked about your membership in the Bund, weren't you, sir?—A. Membership, yes. I was a member—member of the Friends of New Germany, not the Bund.

Q. And you were not asked the specific question were
590 you treasurer of the Bund?—A. That is right.

Q. Therefore you felt you were not called upon to disclose that fact; is that right?—A. I don't know for what reason. I was never asked the question and never paid any attention to it.

Q. Now, sir; concerning your trip to Germany in 1936, how much did that trip cost you?—A. I don't remember. About $450 or $500.

Q. $400?—A. $450 or $500. I do not remember.

Q. $450 or $500. Was that the round trip?—A. Yes, sir.

Q. Who arranged your trip?—A. I myself, did.

Q. You made the reservations and all that yourself?—A. Yes, sir.

Q. And where did you get the money?—A. I earned it.

Q. Is that money you saved?—A. That is correct.

Q. At that time in 1936 you had savings of what?—A. Of my income.

Q. Savings of what amount?—I do not think you understood me?—A. Well, I had worked in the place for three years.

Q. I am only trying to get at this; what amount of savings did you have before you made the trip?—A. Oh, I had about as much as I do recall eight or nine hundred dollars.

Q. I see. And out of that you paid for the trip;
591 is that correct?—A. Pardon me?

Q. Out of that you paid for this trip?—A. That is correct; yes, sir.

Q. Did you travel alone or in the company of anyone on that trip?—A. I travelled alone.

Q. You know, do you not, sir, that the German-American Bund as it then was also made a trip to Germany, to the Olympic Games?—A. I knew of that.

Q. You visited Berlin to see the Olympic Games, did you not?—A. That is correct.

Q. Did you see any members of the Bund tour while you were in Berlin?—A. I have; yes, sir.

Q. Which members of the tour did you see, or of the organization?—A. Well, I don't know. I had met them in Chicago in 1935. I do not recall their names.

Q. Well, can you recall any name, sir?—A. No, sir.

Q. Cannot recall a single individual you met?—A. I know Frank Gebhauer; he is one.

Q. Gebhauer?—A. Yes.

Q. Anyone else?—A. No, sir. I believe that is the only one I saw.

Q. Did you know Dr. Willumeit?—A. No, sir; I did not see him.

Q. You know who he is, though, don't you?—A. I have heard of him.

592 Q. Anyone else?—A. No, sir.

Q. Was there not also in that summer a meeting of the Nazi Party at Nuremberg?—A. I was not there; I do not know.

Q. I did not ask you whether you were there, I asked you was there such a meeting, sir?—A. I could not tell you that.

Q. You just do not know. Were you in Nuremberg at all at that time?—A. No, sir; I was not.

Q. Now, sir, coming to your testimony here concerning June of 1942, you testified to us that on June 22 you received this note which told you to come down to Grand Central station to meet Franz from Chicago; is that correct?—A. That is correct.

Q. By the way, was the note in German or in English?—A. In English.

Q. Who is Franz from Chicago?—A. Well, it turned out later to be Werner Thiel.

Q. Whom did you think it was when you received the note?—A. I did not know, sir. I didn't have any thought.

Q. You had no idea at all, sir?—A. No, sir.

Q. You had no idea at all?—A. I had no idea at all who it could be.

Q. This much we can be clear about, can we not—that
593 Werner Thiel's name is not Franz?—A. No, sir; it is not.

Q. Did Werner Thiel ever use the name Franz?—A. No, sir; not that I know.

Q. Is "Franz from Chicago" some kind of code or prearranged identification——A. Not that I know of.

Q. Between you and Thiel?—A. Not that I know of. I never heard of it.

Q. Had you ever used that particular designation for either yourself or for him?—A. No, sir; never.

Q. What was your thought on the note; did you think it was a practical joke when you received it?—A. I could not tell you; I did not know. The note was not written by me.

Q. You took it seriously at least, didn't you?—A. I did, insofar as I went down to see who it was out of curiosity's sake.

Q. You did not think it was a practical joke?—A. Well, I was not sure myself what it was.

Q. Were you sure the note was for you?—A. Well, it was shoved under my door, and my name was called.

Q. Have you ever had a similar experience before?—A. No, sir; I did not.

Q. Did you receive an anonymous communication ordering you to go somewhere?—A. No, sir; never.

Q. From a person you did not know?—A. No, sir.

594 Q. When Werner Thiel came toward you in the Grand Central station, however, you immediately decided he was Franz from Chicago, didn't you?—A. Well, yes.

Q. You did not wait around to meet someone else, did you, sir?—A. No, sir.

Q. You asked Thiel who put the note under your door?—A. As I do remember, yes; I asked him.

Q. And what did he say to you, sir?—A. Well, some other time he would tell me that.

Q. Did you ask him "Why not tell me now?"—A. No, sir.

Q. Didn't you know at that very moment, Mr. Witness, that Thiel was an enemy and here for no good?—A. No, sir; I did not.

Q. And you knew he was a member of the Nazi party?—A. Well, I had known that; yes.

Q. A violent Nazi?—A. Not a violent one; I had never known him as such.

Q. You say what?—A. I had never known him as a violent man.

Q. Didn't you tell us the other day, though I do not have the exact spot in the minutes at hand but it seemed to me you told us he was a man that adhered very strong to certain ideological views?—A. Well, he was——

Q. Didn't you tell us that, sir?—A. I did tell you that, yes; but not violent.

595 Q. Didn't you tell us he was a man who believed that 200,000 lives could well be spent for the glory and expansion of the nation?—A. That was in 1935.

Q. And didn't you tell us he was a man who became very irritated when opposed in argument?—A. Yes, but that still is not violent as I see it.

Q. Would you describe Thiel as an out and out Nazi—the words that have been used heretofore here?—A. No; I would not.

Q. You would not go along with that definition of him?—A. No, sir.

Q. What would you say he was, a lukewarm Nazi, to use a phrase that was used here?—A. Well, I believe he would never have joined the National Socialist Party if he had not come into

the wrong party, you know. He had friends, other people, who influenced him, and if he had not met these friends he would never join the party. He must have been influenced.

Q. Would you say he was a lukewarm Nazi?—A. Well, I don't know how to describe him, but he was not a radical one.

Q. In other words you did not consider him a very strong Nazi; is that what you are telling us now, sir?—A. Well, I would say that is correct; yes, sir.

Q. Now coming back to where we were at the time you
596 met this man Thiel, the last you had heard from him he had been in Germany?—A. That is right.

Q. And you knew that the minute you saw him; that flashed into your mind, did it not?—A. Yes, sir.

Q. And you knew he had left the United States because he was anxious to get back to Germany before war started with the United States?—A. I did know that; yes, sir.

Q. And you still say at the time you saw him, the very moment you saw him, the thought never crossed your mind that this man was here from Germany for no good purpose as far as this country was concerned?—A. No, sir; I had not that thought. I suspended all doubt until he was going to tell me.

Q. You did not feel that any Nazi recently arrived from Germany in time of war was just on those facts alone an enemy of the United States?—A. I would not say that, but I excepted Werner Thiel. I would not think that of Thiel.

Q. I do not know that that answers my question, sir. Let me put it again. I will put it in the present. Do you not feel now that any Nazi recently arrived from Germany in this country in time of war is, on the face of those facts alone, an enemy of the United States?—A. Well now I feel like that; yes, sir.

Q. But you did not feel like that when you saw Werner
597 Thiel in the Grand Central station a few months ago?—A. No; I did not.

Q. Is that what you say, sir?—A. That is correct.

Q. Did you ever ask Thiel later why he had written this note?—A. No, sir.

Q. Did you ever ask him why he was so secretive about it?—A. I never asked him about it.

Q. The note was never discussed with him again?—A. No, we did not discuss it again.

Q. Were you not curious to know why the note was delivered to you in this form and written in this way?—A. No, sir; because the bearer of the note had been described to me by Mr. North as a short fellow who spoke English.

Q. That is why you were not curious?—A. That is right.

Q. Did the description sound like anyone you knew?—A. No, sir.

Q. Weren't you curious as to why if Thiel wanted to get in touch with you he could not do it a little more directly than in this rather mysterious fashion?—A. I had not thought of that.

598 Q. You never asked him beyond that one time at the Grand Central?—A. That is correct; never have asked him again.

Q. And you were not curious about it at all?—A. I forgot about it.

Q. As a matter of fact, sir; did not the very manner in which Thiel got in touch with you give you a clue right at the beginning that he was here on some secret mission?—A. No, sir; it did not.

The COURT. Tell me, how did he get your address since he had been in Germany?

The WITNESS. Your Honor, he had my address from Germany. I had written to Thiel, as it was shown yesterday, a letter, and he knew my address from the letter I had written to Germany, and when he left I was living in the same room where I was living when I met Thiel the first time.

Q. Let me ask you, sir; was this note in Thiel's handwriting?—A. No, sir.

Q. Was it in any handwriting known to you?—A. It was in a handwriting—as much as I do recall, it was in a handwriting I had never seen before.

Q. So that you knew then, didn't you, the minute you met Thiel, that he had colleagues or confederates over here of some
599 kind or other, didn't you.—A. Well, I have that point given no thought whatsoever.

Q. Didn't you know that, sir; at the time you met Thiel?—A. No; I did not know that.

Q. You knew, didn't you, that he had not written the note?—A. Well, I knew then, yes; but if these men were colleagues of his I did not know, or the man who wrote the note.

Q. Let us say at least he had someone who was willing to help him get in touch with you, isn't that correct?—A. Well, yes; if you follow up that thought that would be.

Q. Didn't that thought occur to you at the time you met in Grand Central Station?—A. No, sir; it did not.

Q. Wasn't this whole thing rather mysterious to you, sir?—A. Well, in a way, yes, it was. I was surprised to see Thiel.

Q. There was something unusual and mysterious about his appearance in this country?—A. Absolutely, because I did not expect him at all.

Q. And about the manner in which he got in touch with you?—A. Well, I did not wonder about the manner he got in touch with me, but I wanted to see Thiel.

Q. You did not wonder about the way in which he got in touch with you. That struck you as a perfectly normal way of his getting in touch with you or any of your friends getting in touch with you, is that right?—A. Well, in view of the fact that I
600 was so surprised by the appearance of Thiel, I did not pay any further notice to the note.

Q. By the way, Mr. Witness, you have testified at length here about your various studies and your various occupations and interests. Were you ever interested in law?—A. No, sir; I was not.

Q. Isn't it a fact, sir; that at one time you were particularly interested in the law of treason?—A. No, sir; I have never been interested in that.

Mr. MEDINA. I object to that question, your Honor, so that the record may be clear, and move to strike out the answer. I think your Honor realizes from some statements I have made to you that we are approaching now a matter of considerable significance and I want my record clear.

The COURT. I take it that there is some question of law you would like to discuss?

Mr. MEDINA. Yes, your Honor.

Mr. CORREA. I am going to attempt to impeach the witness on his last answer, Judge. I won't make a specific offer of proof, or I won't if counsel has objection, I will put it that way, until your Honor has ruled.

The COURT. I will excuse the jury so that the matter may be discussed.

(Jury retired.)

601 Mr. CORREA. I should like to state my position, your Honor.

This is an exceedingly important matter, and, as we are now approaching it, I should prefer not to have the witness hear this discussion in view of the situation. I suggest——

The COURT. Would you like him to retire?

Mr. MEDINA. It is agreeable to me that Mr. Cramer be taken to the witness room opposite, so the discussion goes on in his absence.

Mr. CORREA. Either that, or we have a discussion at the bench; one or the other, Judge.

Mr. MEDINA. Mr. Minton calls my attention to the fact that no part of the trial may properly proceed in the absence of the defendant and that I may not consent to that, so I withdraw that statement.

The COURT. We are discussing a question purely of law.

Mr. CORREA. I think that is really as to the taking of proof, because that is based on the principle of confrontation of witnesses or by witnesses.

Mr. MEDINA. I want to take an absolutely correct position in this case. And if it be, as Mr. Minton indicates to me, that we have no right to consent to have any part of this trial proceed in the absence of Mr. Cramer, I am not going to consent that he be taken out. Someone might take the position that we had
602 waived some constitutional right of Mr. Cramer, and I do not intend to waive anything.

The COURT. If you wish to discuss it, go ahead.

Mr. CORREA. If your Honor please, we are going to offer proof to show that this defendant some time prior to the crime charged in the indictment, specifically adverted to the particular provision of the Constitution of the United States which defines the law of treason. As your Honor is aware, that provision is defined in the Constitution in practically the same words as those in which it appears in Section 1, Title 18.

Now, I have asked the defendant, and I have laid a foundation isn't it a fact that he was particularly interested at one time or another in the law of treason, and he has denied that. Now, I propose to introduce the exhibit by way of impeaching his last answer.

The COURT. I think it probably would be very well to look at this article.

Mr. CORREA. I will be glad to show the exhibit, which is Government's Exhibit 55 for identification, to the Court, if I may. I should like to point out the specific portions to which I am referring.

The COURT. Do you want to see this, Mr. Medina?

Mr. MEDINA. Oh, I am thoroughly familiar with it, your Honor.

603 (Mr. Correa indicated portions to the Court.)

The COURT. What do you wish to say, Mr. Medina?

Mr. MEDINA. I have this to say, your Honor: This is a newspaper containing a copy of the Constitution of the United States. I believe if this paper gets before the jury here there will be before them a piece of evidence of absolutely no probative value on these issues whatsoever, or if it have some slight probative value, it will be so insignificant as to be out of proportion to the emotional value, to the nonjudicial value. This paper is dynamite and it has absolutely no judicial worth whatsoever.

The COURT. If it is dynamite, he created it.

Mr. MEDINA. If your Honor please, he did not create it, and I dispute that. I say there is no principle better known in the

law than that is some piece of evidence of no judicial worth, of no rational probative force whatever, if put before a jury, where for other reasons, other reasons having no relation to probative value, nevertheless the evidence is admitted, then the error is prejudicial because the law takes cognizance of the fact that there are things that, as I describe it, are full of dynamite; that have an emotional appeal; that have an effect upon human beings out of proportion to their true judicial worth, and the law of
604 relevancy says that in such cases the evidence must be excluded lest prejudice and harm to a defendant result.

Now, all that appears from this paper is that in going over this copy of the Constitution the defendant has placed some ink marks opposite about a dozen different portions of the Constitution. It so happens that one of those is opposite the provision applicable to treason, way back here in 1937, and the evidence given by Mr. Willis, as part of the Government's case, was that the defendant had stated he had put those on two years before, or maybe a year and a half before June 1942, and so we say that if merely putting some ink marks opposite a considerable number of sections of the Constitution years before a particular crime is supposed to have been committed, and then the fact that one of those lines is opposite the particular crime for which the defendant is later charged, is to be placed before a jury, grave harm and prejudice will result. And I say this beyond. If this question to Mr. Cramer as to whether he studied law is going to be any foundation, I say, with all due respect for my learned adversary, that that is sheer pretense. That is used as a means, used as I think an improper means. He does not really want to put this in for the purpose of impeaching Mr. Cramer's statement that he never studied law and he never made any study of the law
605 of treason; that cannot be it at all. Facing the problem squarely as one of relevancy, we say that this is a most prejudicial piece of evidence and we are going to object to it, and that is why at the very threshold of it here, when the first point came in about it, I raised it, so that my record might be clear.

MR. COBREA. If your Honor please, it seems to me that counsel's argument in opposition to this offer has consisted mostly in characterization of it as not relevant and not having probative force without any very clear statement as to why in counsel's view those things are so concerning the offered evidence.

I point out to the Court first that of course I wish to offer the exhibit to impeach the witness, for had the witness admitted that he had given particular attention to the law of treason at some time prior to the commission of this crime I would not need the exhibit for that purpose. I do conceive it to be of probative

value and probative force in this case that this witness had in mind at the time these events which are the subject of the indictment here occurred, what the law of treason was. I point out to your Honor that among the very last questions asked the witness on his direct examination this morning were questions to the effect,

606 did you have any thought of adhering to an enemy of the United States; or, did you think that anything you were doing would aid and comfort enemies of the United States;

and similar questions couched in the verbiage of the statute and of the Constitution itself, and to all of those the witness replied, of course as might be expected, that he did not.

Now, I submit that apart from its general relevancy and probative force, the direct examination itself has strengthened and confirmed the relevancy and materiality of the offered evidence, and I press my offer.

The WITNESS. Your Honor, will you let me——

Mr. MEDINA. No, Mr. Cramer, you just stay right there and keep your mouth shut.

The COURT. There is nothing for the Court to rule upon as yet.

Mr. MEDINA. I believe the offer has just been made of the document, has it not?

Mr. CORREA. No; that is not correct.

The COURT. But so that you may know and we won't have to excuse the jury again, if a proper foundation is made I will receive the paper in evidence.

Mr. MEDINA. That "if" puzzles me, your Honor.

The COURT. It has not as yet been shown.

Mr. MEDINA. Thank you, your Honor.

The COURT. Don't be misled by it. I anticipate that with

607 a few questions that the foundation will be laid.

Mr. MEDINA. But I take it that your Honor rules at the present moment no foundation has been laid for the paper.

The COURT. Of course they have not shown where the paper came from or showed about the marks on it.

Mr. MEDINA. Yes, they have. Let us not pass in a fog. They have shown by Mr. Willis that this witness, the defendant, told him that he had put those ink marks on here either two years before June or about a year and a half before June 1942, and that paper has already been identified and it is marked as an exhibit for identification.

The COURT. If it is shown, as you say it has been, that those marks were put on it by the defendant and it was found in his room, I shall admit it as material and relevant.

Mr. MEDINA. And I take it your Honor does not admit it because Mr. Cramer said he had not studied law and had not studied up the law of treason.

The COURT. I am not going to limit the grounds on which I receive it.

Mr. CORREA. The foundation question, Judge, was this: You were particularly interested in the law of treason, were you not; to which the witness said, No.

608 Mr. MEDINA. Well, I objected, your Honor, you remember, to that question, and I moved to strike out the answer.

The COURT. The motion is denied.

Mr. MEDINA. Exception.

(Short recess.)

(The jury returned to the jury box.)

By Mr. CORREA:

Q. Isn't it true, sir, that there came a time when you were particularly interested in the law of treason?—A. No, sir.

Q. Didn't you consider specifically at one time the provisions of the Constitution of the United States relating to the law of treason?

Mr. MEDINA. I object to that, your Honor.

The COURT. Objection overruled.

Mr. MEDINA. Exception.

A. Will you please repeat that question?

Q. (Read.) A. no, sir; I have never considered that.

Q. They have never been brought to your attention; is that your testimony?—A. No, sir.

Q. Well I show you Government's Exhibit 55 for identification [handing to witness], and ask you first, sir, is that a

600 paper which you kept in and about your room?—A. I found that; yes.

Q. Well, can you answer my question: Is it a paper which you kept around your room?—A. Yes, it is.

Q. I direct your attention specifically to certain ink lining.—A. Yes, sir.

Q. Which appears on the next to the fourth column of type from the left on the exhibit, and ask you did you place that there, sir?—A. I remember to have placed it there.

Q. Well, is your answer yes?—A. Yes, sir.

Q. When did you place it there, sir?—A. Well, I do not recall the time. About two years or two years and a half.

Q. And is that your best estimate as to the time?—A. Yes. I hardly remember the time.

Q. You placed other markings on this paper, did you not, sir?—A. Yes, sir.

Q. In ink?—A. In ink.

Q. Were they all placed there at the same time or at different times?—A. Yes, sir; at the same time.

Q. And you cannot recall at what time you made those markings; is that it?—A. No, sir; I cannot.

Mr. MEDINA. All of the reference to the perpendicular lines?

Mr. CORREA. That is right; to every marking in
610 ink made by the defendant on the exhibit.

Mr. MEDINA. I had in mind that there is another little thing there on the first column that I do not believe it is claimed is in his handwriting, but just the perpendicular lines.

By Mr. CORREA:

Q. I direct your attention to what counsel has called this other little thing on this column, and ask you, sir; did you make that writing?—A. Not that I do, no.

Q. Do you know who did?—A. No, sir; I do not.

Q. Was it there when you first acquired possession of this paper?—A. I do not know that.

Q. Was it placed there after it was in your possession?—A. I do not know that.

Q. You do not know what the significance of that is?—A. No, sir.

Q. You don't recall seeing it there before?—A. No, sir.

Q. Now, sir; you were shown this paper by Mr. Willis, weren't you?—A. Yes, sir.

Q. Weren't you asked the same question about the particular ink lining to which I direct your attention, as to when you made it?—A. Yes, sir.

Q. Didn't you tell him you made it a year or two years before this summer?—A. Yes, sir.

611 Q. And is that a correct statement of fact?—A. Yes, sir.

Mr. CORREA. I offer in evidence Government's Exhibit 55 for identification.

Mr. MEDINA. I object to that as irrelevant and immaterial, as having no probative force whatever; and upon the further ground that if it should be deemed to have any slight probative value that is far outweighted by its atmospheric value, which I claim will be highly prejudicial. It is irrelevant and should be excluded.

The COURT. This is Exhibit 55 for identification?

Mr. MEDINA. Yes; your Honor.

The COURT. And 55–A for identification, is it?

Mr. CORREA. Exhibit 55–A for identification was a handwriting standard, if my recollection serves me, and offered as such.

The COURT. I am not sure about it.

Mr. MEDINA. I believe Exhibit 55–A is a little paper signed by Mr. Cramer, indicating that he made the lines on this Exhibit 55.

Mr. CORREA. That is correct, Judge, it is; and I think we of-

fered it before and it was received in evidence as a handwriting standard.

Mr. MEDINA. Yes.

Mr. CORREA. Now, I will offer the exhibit without
612 limitation at this time—which is a reoffer, because it was received heretofore with a limitation.

The COURT. That is Exhibit 55 for identification and also 55-A——

Mr. CORREA. In evidence, which was offered without limitation. In other words this is reoffered.

Mr. MEDINA. I object to both, as they relate to the same thing, and I have already stated the grounds of my objection, your Honor.

The COURT. They are received in evidence.

Mr. MEDINA. I respectfully except.

(Government's Exhibits 55 for identification now marked in evidence.)

Mr. CORREA (to jury). Members of the jury, Government's Exhibit 55 in evidence is a page of the New York Times of date Friday, September 17, 1937. As you can see, the page sets forth the Constitution of the United States in full. Now, you will also note that there appear on this page certain linings in ink. Some of it is underlining and most of it is marginal. There is this writing here in the lower part of the first column, which the witness states he knows nothing about. The other lining the witness has stated was made by him. I wish particularly to direct
your attention to the lining about which the witness was
613 interrogated, appearing in the fourth column, over opposite Section 3. It is Section 3 of Article III of the Constitution. That section reads:

"1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

"2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."

The other part of the exhibit, which is 55-A, has this writing which has heretofore been identified as being in the handwriting of the defendant, and reads: "August 12, 1942. I hereby identify a page from the New York Times newspaper dated Friday, September 17, 1937, as having been part of a newspaper obtained by me on a date which I do not recall. The lines appearing on the page of the New York Times were made by me in ink. Anthony Cramer. Witness: John G. Willis, FBI, New York City."

You might look at the interlineation that appears on the exhibit itself.

614 I should like to direct the attention of the jurors to certain things on that same page, and I wonder if it is to be passed among them, as doubtless it will, if it would not be within my right to ask the privilege to call their attention now to the other portions of this exhibit before they look at it.

The COURT. I think it would be.

Mr. MEDINA (to jury). If you gentlemen will permit me to have this just a second. Your attention has been called to the provision about treason. Now I would like you gentlemen when you examine this to notice that there are several other places where Mr. Cramer has made marks also. He did not just mark the one about treason, but he has marked a lot of the others, and I want to just call them to your attention here. I will have to get my glasses out to do this.

Now for instance—and I will hand this to the foreman to be passed around, but I have to sort of lean over this way so I can read it—under Section 9 here he has put these marks around the following:

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety shall require it."

"No bill of attainder"——

615 and then he has underlined "or ex post facto law shall be passed.".

Then down here there is another one in that same Section 9: "No title of nobility shall be granted by the United States. And no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office or title of any kind whatever from any king, prince, or foreign state."

Then he has also marked up here under Section 8, which defines the powers of Congress; one of them that he has marked is: "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

And then he has also got a mark over here that you may see, that goes over this way, in which he has indicated the oath of office of the President of the United States, which is as follows here. It says:

"Before he enter on the execution of his office he" meaning the President, "shall take the following oath or affirmation: I do solemnly swear or affirm that I will faithfully execute the office of President of the United States and will to the best

616 of my ability preserve, protect, and defend the Constitution of the United States."

And then over here he has got another one under Section 7. It says:

"If any bill shall not be returned by the President"——

And then he has evidently underlined "within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return; in which case it shall not be a law."

And so there are a few others, but I wanted you to realize that he did not just mark that one article on treason, but a number of others of the character that I have referred to.

Mr. CORREA. In view of counsel's last statement, which is in the nature of argument, if your Honor please, may I also state that the exhibit is offered specifically at this time in view of the fact that the witness just now on the stand denied the provisions of the Constitution respecting treason had ever come to his attention, and denied that categorically.

617 Mr. MEDINA. I thought it was whether it had been brought to his attention. I wonder if we might not have the stenographer read it.

Mr. CORREA. I do not think the witness intended such a quibble in his answer.

Mr. MEDINA. I do not consider it a quibble.

(The stenographer then read the questions referred to as follows:

"Q. Isn't it true, sir, that there came a time when you were particularly interested in the law of treason?—A. No, sir.

"Q. Didn't you consider specifically at one time the provisions of the Constitution of the United States relating to the law of treason?—A. No, sir; I have never considered that.

"Q. They have never been brought to your attention; is that your testimony?—A. No, sir.")

Mr. MEDINA. "Never been brought to your attention"—so I was right in what I said.

Mr. CORREA. That is a mere quibble.

Mr. MEDINA. No; it is not a quibble. They had never been brought to your attention—that is very different.

Mr. CORREA. Judge, I will stand on the record as it is.

618 Mr. MEDINA. If that is a quibble I will stand on it too.

By Mr. CORREA:

Q By the way, Mr. Witness, is that what you meant when I asked you had the provisions of the Constitution respecting the law of treason ever been brought to your attention? Did you say no because——A. May I explain, your Honor? May I explain, your Honor?

The COURT. You better answer the question.

Q. Did you say no because I did not ask you whether they had ever come to your attention?—A. I was under the impression that you meant I had studied them. I do not recall the time I read it; I do not even recall the time I marked it.

Q. Suppose I ask you the question did those provisions ever come to your attention, would you answer that differently than "brought to your attention"?—A. At a time; yes, they have.

Q. In other words you would answer that differently from the question "brought to your attention"?—A. Well, yes.

Q. You feel there is an important difference there; is that correct?—A. I thought you meant to imply that I studied these things, and I have not studied them.

Mr. CORREA. I have some more examination on this paper, Judge, but I think I will wait a moment to have the jury look at the exhibit itself.

619 The COURT. Yes; give them an opportunity to look at it.

Q. Now, sir, when did you place this—or rather I withdraw that, because I think I have asked you. You say what you told Mr. Willis was true, is that right, about when you placed these markings on this paper?—A. Yes, sir.

Q. And you told him it was between a year and two years prior to the date of your interview with him; is that correct?—A. Yes, sir.

Q. And your interview with him was in August of this year; is that right, sir?—A. I think it is right; yes, sir.

Q. That would mean you placed the markings on here in the early part of the year 1941?—A. I do not recall the time when it was.

Q. You told Mr. Willis between a year and two years, and you told him that in August of this year. Now going back a year would bring you to August 1941, wouldn't it?—A. That is correct.

Q. And then another half year since you said between a year and two years, would bring you into the early months of 1941?—A. Correct.

Q. That is about the time Werner Thiel went to Germany, isn't it?—A. That is right; yes, sir.

Q. Was there anything said between you and Thiel on the occasion of your last meetings before he left this
620 country in 1941 which caused you to examine these sections of the Constitution relating to treason?—A. No, sir.

Q. Or habeas corpus?—A. No, sir. I am positive that these marks were made before Thiel left Germany.

Q. Before Thiel left?—A. Before Thiel left for Germany.

Q. "For Germany." Was it just before he left, sir?—A. I do not recall the time. I really do not know that. I do recall that it was before that.

Q. And can you tell us, whenever the time was, or whatever the time was when you placed that marking next to the provision of the Constitution relating to the law of treason, what then was your interest in that provision of the Constitution?—A. It is my habit whenever I read, when something strikes my imagination or my curiosity, that I mark a paragraph, and I don't know for what reason I have marked it. Most likely for the same reasons that I had marked other paragraphs.

Q. We are now interested, sir, in your reason for marking this particular paragraph, the paragraph relating to the law of treason.—A. I do not know; I have not the slightest idea. I cannot recall it at all.

Q. Because although there are other paragraphs marked,
621 there are a great many paragraphs not marked; is that right?—A. That is correct.

Q. Therefore there must have been something about this particular provision Section 3 of Article III, the law relating to treason, which as you put it captured your imagination or your curiosity.—A. Mm-hm; yes, sir.

Q. What I am trying to find out is what was it made you interested at that time in the law of treason?—A. I could not tell you. I do not recall the time I marked it, and I do not recall for what purpose I did it.

Q. Let me ask you this, sir; Was it because of the fact that at that time you were very—you felt very strongly?—A. Strongly about what?

Q. About Germany's position in the then war?—A. No sir.

Q. Was it because you apprehended this country and Germany would soon be at war?—A. I do not know the reason. I know that none of these reasons mentioned were the cause for marking it.

Q. Whether or not they are the cause, it is true that at that time you felt very strongly in sympathy with Germany's position in the then war, did you not?

Mr. MEDINA. I object to that, your Honor. There was not any war then as I understand it.

Mr. CORREA. There was a war, if your Honor please.

622 The COURT. I think the question is clear.

Mr. CORREA. I have said the "then war" to try to distinguish it.

The COURT. If the witness does not understand it he can say so.

Mr. MEDINA. The words "the then war" are clear, your Honor, but it is not clear in connection with the testimony of the witness as to when he marked the paper.

Mr. CORREA. If your Honor please, I think I am entitled to ask any proper question on cross-examination. I ask that the question be read.

Mr. MEDINA. I withdraw the objection.

(The question was read as follows:

"Q. Whether or not they are the cause, it is true that at that time you felt very strongly in sympathy with Germany's position in the then war, did you not?"

A. No, sir.

623 Q. Didn't you feel, sir, that the "glorious German army was making gigantic sacrifices for the homeland"?—A. I have been very little interested in Germany's war. My interests are in this country; have always been.

Q. Did you feel that, sir?—A. Pardon me?

Q. Did you feel that, as I have stated, "the glorious disciplined German army was making gigantic sacrifices for the homeland"—your homeland?—A. Well, if I have mentioned that, that may have been a piece of braggadocio; I may have never felt about it.

Q. What do you mean by "may have been braggadocio"; bragging about the German army?—A. A piece of flourishing statement; nothing else.

Q. In other words, if you said that you did not mean it, is that correct?—A. Well, not the emphasis that seems to be in those words.

Q. You did not mean what the words say, is that what you are telling us, sir?—A. Well, this is such a long time ago I do not recall exactly what kind of feelings I had when I meant and wrote those words.

Q. Do you recall whether or not, so there may be no doubt about it, I refer to Government's Exhibit 69 in evidence, and particularly to those words, "personally I am still well and spending my days really much too pleasantly in view of the gigantic sacri-

624 fices which the glorious disciplined German army is making from day to day for the homeland"?

Mr. MEDINA. May it appear what the number of the exhibit is.

Mr. CORREA. I just stated it was 69; 69-A is the translation.

Mr. MEDINA. And that is that letter?

Mr. CORREA. It is a letter to the family of Heinrich Cramer. That is the Cramer letter dated December 3, 1941.

Q. Now did you mean what you said there, sir?—A. Well, I must have.

Q. You did, didn't you?—A. I have confirmed that; yes.

Q. Were not you apprehensive as well in 1941 that the United States and Germany would be at war?—A. I never thought of that. I never have considered. I would not—I never thought it would come to a war rather.

The COURT. The date of that letter was December 3rd?

Mr. CORREA. December 3, 1941, if your Honor please.

Q. Were not you apprehensive, sir, that there would be war between the United States and Germany?—A. No, sir.

Q. I will come to that later, but let me ask you, did your feeling about Germany's position in the war have
625 anything to do with your marking of this provision of the Constitution?—A. I am positive it had not; no, sir.

Q. Did it have anything to do with your marking the provision of the Constitution relating to the ratifying of war by Congress?—A. No, sir.

Q. Did it have anything to do with your marking that provision of the Constitution relating to the writ of habeas corpus?—A. No, sir.

Q. Now, sir, let me ask you concerning this money belt: you stated on direct examination that you placed Thiel's money belt in your shoe box because you intended to use it for shining your shoes, is that correct?—A. That is correct; yes, sir.

Q. Now you have described, sir, many lengthy interviews that you had with Mr. Willis and other FBI agents, have you not?—A. Yes, sir.

Q. Did you at any such interview ever advance the suggestion that you were going to use this money belt for shining your shoes?—A. I do not know that.

Q. Don't you know that you did not, sir?—A. I have never been asked about the specific purpose.

Q. Is it true that you never mentioned that in connection with anything you said about the money belt?—A. That is correct.

Q. Prior to mentioning it here in court.—A. Well,
626 I have been intending to use this belt as a shoe shiner.

Q. That is not what I asked you. I asked you, have you ever mentioned it heretofore, before your testimony here in court?—A. I do not know that.

Mr. MEDINA. You mean to the Government men?

Mr. CORREA. I would like the witness to answer, seeing my question is clear.

Q. You say you do not know whether you ever mentioned it or not?—A. I do not recall that; no.

Q. Now, sir, when was the first time you put that money belt into your shoe box?—A. I believe it was—I am sure it was the evening of June 23rd, when I met Thiel.

Q. And when you came back home you put the money belt in your shoe box; is that correct?—A. I did.

Q. Isn't it a fact, sir, at that time it had $3,500 in American currency in it?—A. That is correct.

Q. Now certainly at the time you put the money belt with the $3,500 into your shoe box, you did not intend to shine the shoes

with it?—A. I took the money out of the belt the very same evening and put it in my drawer and put the belt back in the shoe box.

Q. Now, sir, that is not what you told the FBI, is it?—A. But it is a fact. I have been pondering about this thing.

Q. I would like to ask you first, is that what you
627 told the FBI?—A. I do not recall that.

Q. Don't you recall what you told the FBI on this subject, sir?—A. Yes.

Q. You heard it read by your counsel here this morning, didn't you?—A. Yes; I do.

Q. You know that you told the FBI that you put the money belt in the shoebox on Tuesday night, the 23rd?—A. Yes.

Q. And that before you went to work, that on the 24th, rather, when you came home from work, that you took the money belt out and took the money out of it and counted it?—A. No; I counted it immediately, the same evening, and put the money in a drawer and put the money in a shoe box.

Q. Didn't you tell this to the FBI, sir—what I am stating to you now?—A. I think I did.

Q. Is there any doubt about it, sir?—A. Well, yes.

Q. I will show you your Exhibit C in evidence, and I direct your attention to the language appearing at the bottom of page 5, the last line, sir, "When I arrived home I put the"—and then continuing on the top of page 6 and down as far as it goes on that subject [handing exhibit to witness]?—A. The fact is that I have counted that money immediately when I came home and put the money out of the belt in my drawer, and put the belt back
628 in my shoebox. I was a little confused at that time about this.

Mr. CORREA. I move to strike out the answer and ask that the question be read.

The COURT. Strike it out.

Mr. MEDINA. When he says "I was a little confused about this," may not that remain?

The COURT. I do not think that is an answer.

Mr. MEDINA. Exception.

Q. (Question read.)

A. There is no question there. I was directing the witness's attention to the exhibit and I wanted to ask him a question on it. Isn't it a fact, sir, that you told the FBI and told them very specifically that you had put the money belt with the money in it into your shoebox and then put the box under the radio? Isn't that what you told them?—A. Yes, sir; it is.

Q. And you described to them taking the money belt out of

the shoebox on two occasions; once on the 24th and once on the morning of the 25th, isn't that correct?—A. Yes, sir.

Q. And on each occasion you said you took the money out, on the first occasion to count it, and on the second occasion to take it to the bank, isn't that right?—A. That is what I said.

Q. And you now say that that statement which you gave
629 the FBI was not the fact?—A. That is correct; yes, sir.

Q. And that the fact is otherwise?—A. That the fact remains that I took out the money immediately and put in the drawer and put the belt in my shoebox. I have been thinking about that because on account of the accuracy of the statement required.

Q. Are you answering a question of mine, sir?—A. Pardon me?

Q. Are you answering a question of mine?—A. Yes, sir.

Q. Now, sir, isn't it a fact that when you replaced the money belt in your shoebox after you had taken the money out, you did that for the purpose of concealing the belt?—A. No, sir; it is not.

Q. And isn't it a fact that since you made the statement to the FBI it has occurred to you that that is incriminating and you thought up this explanation about shining your shoes and you have changed your story to fit it, isn't that the fact?—A. No; I have never thought of that.

Q. You say that is not the reason you changed your story?—A. No, sir. The reason is that I put the money in my drawer——

Q. Now, sir, I show you the money belt which we have been talking about, which has been marked Exhibit A. Can you
630 recall the testimony of one of the witnesses here that there were certain initials that had been rubbed out, appearing at the end of the money belt?—A. I have heard the man say that.

Q. Did you rub the initials out, sir?—A. No, sir; I did not.

Q. Did you discuss with Thiel the fact that his initials were on this money belt?—A. No, sir; never knew about it.

Q. Did you notice any initials on the money belt when you received it?—A. No, sir.

Q. Did Thiel tell you that he had erased these initials on the money belt?—A. No, sir; he did not.

Q. Now isn't it true, sir, that your first thought about Thiel's mission over here was that it was a violent one?—A. I beg your pardon?

Q. Isn't it true that your first thought concerning Thiel's mission over here was that it was some mission of violence?—A. No, sir; that has not occurred to me.

Q. Isn't it a fact, sir, that it was your thought that Thiel would not have been given money by the German government unless his mission was a violent one?—A. No, sir. That thought has not occurred to me.

Q. Now, sir, didn't you make this statement to the FBI in which you say, referring to the money Thiel had, and I quote from
631 page 5 of the statement which is Defendant's Exhibit C in evidence: "At this time"—referring to the time you received the money belt from Thiel on the 23rd—"I thought that he might have gotten the money from the German government but I rejected this thought because Thiel was inconsequential so far as violent acts and deeds injurious to persons and property are concerned." Wasn't that your statement, sir?—A. Yes, sir.

Q. You have the statement before you. I am reading from page 5. You may look at it. Do you see the part I have just read to you; that is the second full paragraph down on that page?—A. Yes, sir.

Q. Now, sir, I ask you again, isn't it a fact that your first thought concerning Thiel's mission was that it was a violent mission for which he had this money from the German government, and didn't you reject that because you felt that Thiel was no good at violence, according to your statement?—A. The fact is that I have not been thinking that at all, but this thought had occurred to me while I was questioned by the FBI.

Q. Oh, so this is something you thought at the time you were being questioned and not at the time you were with Thiel, is that right?—A. Yes, sir.

Q. Now that is not what you said in your statement, though, is it? Read your statement. Don't you say there, "At this
632 time I thought that he might have gotten the money from the German government, but I rejected this thought," and so forth? Didn't you tell the FBI that that is what you were thinking at the time Thiel gave you the money belt?—A. I have never been able to recall the thoughts which I had when I saw Thiel first.

Q. That is not my question, sir. My question is, did not you tell the FBI that that was your thought?—A. Well, I have told them that. It is put down here; yes, sir.

Q. Now you are saying that what you told them is not so, isn't that what it comes down to?—A. Well, yes; it does.

Q. This is the second point where we have had something in this statement which you say was not so at the time you made the statement.

Mr. MEDINA. What is it he says was not so? I do not quite get that.

Mr. CORREA. I say this is the second point at which he says that something in the statement was not so at the time he made the statement. The other was about the money belt.

Mr. MEDINA. I did not mean to interrupt, but I did not under-

stand what it is he is saying was not so, but maybe it is clear to everybody else.

633 Mr. CORREA. I will withdraw that question and put it another way.

Q. You have just told us, haven't you, that what you said in this statement is not the fact on this point?—A. The fact is, what I want to imply is, that at the questioning they were demanding—not demanding—but they were asking and searching for reasons, and since I did not know the consequences of my statement I said something to this nature which they wrote down.

Q. Yes; but what you said and what they wrote down you are now telling us is not the fact, isn't that so?—A. That is correct, sir.

Q. And this is the second thing in the statement which you tell us is not the fact, isn't it; the other was about the money belt.—A. That is correct; yes, sir.

Q. Now, sir, when you said to your counsel this morning, just a little while ago, that everything in this statement was the truth, you did not mean that, did you?—A. Well, I was not aware of the consequences of what I have said then.

Q. How many other things have you said, sir, of which you were not aware of the consequences in your testimony?—A. I do not know.

Q. We will try to find out, sir. Now you have told the FBI in this same statement; and I refer to the last page of the state-
634 ment; you told the FBI that if you had thought that Thiel was here for a more sinister purpose involving violence and destruction, you would have tried to persuade him not to do it; and if you did not succeed in persuading him, you would have reported him, isn't that so?—A. I said that.

Q. And was that statement the truth at the time you made it?—A. It was part of the truth.

Q. What do you mean by that?—A. May I explain, Your Honor?

THE COURT. Yes. He asked you to explain it.

A. (Continuing.) At the time when I became apprehended I was not completely aware of the mission of Thiel and made all kinds of statements which I partly felt were correct and which I partly was under the duress—not under the duress, but under the obligation to make. They demanded statements from me, and I said things which later on I knew were not as I had said then, and one of them is that I would consult Thiel about it. The fact remains if I had known of his purposes I would have immediately reported Thiel. I have always liked to help a friend but never to the extent of breaking a law. I would have dropped Thiel like a hot potato.

Q. What you are telling us, Mr. Cramer, is, I take it, that this statement about which you testified this morning that every-
635 thing in it was true, is in many respects not true at all. Is that what you are telling us?—A. I was mistaken about that; yes, sir.

Q. You were mistaken when you told your counsel that this statement was true in every respect, sir.—A. Yes, sir; I was.

Q. Didn't you understand his question?—A. Well, I have not quite understood it. I have not fully understood the meaning of that.

Q. As I recall his question, it was very simple, "Is everything in this statement true?" You say you do not understand that question?—A. No; I have not been aware of the full meaning of that statement.

Q. Do you mean that you were not aware that you were going to be called upon to explain any inconsistencies between this statement and your testimony here on the stand?—A. There are certain things which were not in my head and which I did not know, and which later on after questioning now I know are not so are only partly true.

Q. You looked over this statement, as I recall, at some little length before you gave that testimony concerning it, didn't you? A. Yes, sir.

Q. And you still say that when your counsel asked you this morning, is the statement true, you did not understand that question?—A. I did understand, but I did not think of the consequences of the meaning of the language.

636 Q. As I say, you did not think you were going to be asked to explain the inconsistencies between what you told the FBI on this occasion and what you told this Court and jury here yesterday. Is that what you did not think about?—A. That is correct.

Q. Now, sir, you say in your statement here—and I refer you again to the same place where we were, on page 3—do you see that paragraph that we read the first sentence of? I will read it to you again: "At this time I thought that he might have gotten the money from the German government, but I rejected this thought," etc. Do you recall that?—A. Yes, sir; I do.

Q. Now you say in that statement there that the thought then occurred to you, after you rejected the thought that he had gotten the money from the German government because he was not a violent man, the thought then occurred to you that he might have gotten the money from Dr. Viehaus in Vienna, who left the United States in 1932 and who was a physicist and chemist?—A. Yes, sir.

Q. Or he might have gotten the money from some other prominent person?—A. Yes, sir.

Q. Is that right?—A. That is correct.

Q. Now let me ask you about that statement: Do you stand by that now, or do you tell us that that one is something else?—A. I have said that.

637 Q. You said it. Now is it a fact?—A. That is a fact.

Q. Those thoughts did occur to you at the time you were receiving this money from Thiel, is that right?—A. As I said before, I was not quite aware what thoughts occurred to me at the time. I have simply stated them when I was asked for thoughts in order not to appear to be empty-minded. I was not aware of the consequences of my statements. I had, as I mentioned before, put all doubts aside before because Thiel told me he would tell me his whole story as soon as Norma Kopp came down to the city and he would tell the story over a glass of wine.

Q. I do not think you are answering a question of mine. My question simply was this—and I think you can answer that, if you are able to, yes or no—either it is a fact or it is not a fact.—A. I have made that statement; yes, sir.

Q. You made the statement. Now the statement purports to set forth what you thought about it at the time you received the money belt from Thiel, and I want to know is that what you thought about it? Isn't it?—A. No. Those are the thoughts I have had with the FBI at the time I was questioned.

Q. In other words, to the extent that the statement pur-
638 ports to set out what your thought was at the time you were with Thiel, it is just false, isn't it?—A. According to my statement, it is.

Q. According to your statement now?—A. Yes, sir.

Q. All right. I will accept that amendment. Now, sir, you knew it was false at the time you signed it, didn't you?—A. I was in doubt what kind of thoughts I had had then. I did not know exactly if they were false, so I simply took these statements as the thoughts I might have had.

Q. That is not what the statement says. It does not say "the thought that might have occurred to me." It says, "they are the thoughts that occurred to me; maybe he had gotten the money from Dr. Viehaus," and so forth. That was false, wasn't it, according to the present testimony?—A. It was an erroneous——

Q. It is not the fact. Let us put it that way.—A. I was confused about it then.

639 Q. And you signed it knowing it was not the fact, didn't you?—A. I signed it; yes, sir, because I did not know what it implied.

Q. Didn't you know what was stated in it in black and white is not the fact?—A. The fact is that I have read it over once, and

that one of the special agents told me to read over a couple of times carefully, which I did not do because I attach no meaning to that at all. I did not know the consequences of the whole thing.

Q. I do not want to argue with you, Mr. Witness, but you understood, didn't you, that in this statement you purported to set forth facts?—A. Well, things which I was asked I tried to answer as good as I could.

Q. Didn't you understand the statement in this statement you were setting forth facts, things which had actually happened? Didn't you understand that?—A. I did understand that; yes.

Q. You did understand that. And didn't you know when you read it that certain of the things which you set forth in this statement of yours as being facts were not fact?—A. Well, the opinion of mine was then that whatever I said was of no consequence, because I had no idea of the thing I was involved in.

Q. So it did not matter whether you told the truth or
640 not; is that what you are trying to tell us?—A. Not that, but certain statements I would not have made if I had known what I was involved in or what they accused me of.

Q. Are you telling us you felt the statement was of no consequence and it did not matter whether you told the truth in it or not?—A. I say I always endeavor to tell the truth, but you can tell certain things in a manner where they are accusing and indicting.

Q. Isn't it a fact, while on the statement, first that the statement was dictated in your presence by Agent Willis over here?—A. Yes, sir; it was.

Q. With you making frequent corrections and amendments as he dictated it to the stenographer?—A. Frequent? No. There was only one or two words or a couple of words which I objected to.

Q. Isn't it a fact too, sir, that after the statement was typed in the form in which you have it before you, Agent Willis read it to you aloud in full?—A. Yes, sir.

Q. Isn't it a fact that then you read it over to yourself?—A. I did so; yes, sir.

Q. Isn't it a fact that then you and Willis together read it over?—A. I do not recall that.

Q. Do you deny that is so?—A. I would deny it, because I do not know it.

Q. Isn't it a fact that in all you heard this statement
641 read and had it read to you and read it yourself four times before you signed it?—A. I do recall to having read it myself and with Mr. Willis; yes, sir.

Q. Weren't you told at that time that it was important that you read it over and that it be read to you——A. No.

Q. So that you might be certain that nothing was set forth in the statement that was not the fact?—A. The thought that it was important was never conveyed to me.

Q. Weren't you told that it was important that the statement set forth the facts, sir, and only the facts of your knowledge? Wasn't that told to you?—A. I think it was.

Q. And as a matter of fact didn't you state at the end of your statement, "I have read the above statement consisting of six and one-half pages, and I have signed the bottom of each page to indicate that it is true to the best of my knowledge and belief"? Didn't you do that, sir?—A. Page 6?

Q. The last page, right above your signature.—A. Yes; I have signed that.

Q. Now, sir, did you seriously think that Thiel had gotten this money from Dr. Viehaus in Vienna at that time?—A. I did not think anything serious about the money then,
642 because I had no clue at all.

Q. But did you at any time seriously entertain even the thought he had gotten it from Dr. Viehaus in Vienna?—A. It was more of a speculative than of a serious nature.

Q. You knew, did you not, that no private citizen in Germany could have $3,500 in American money?—A. I did not know that; no.

Q. Did you think it likely a private citizen in Germany would have that amount in American currency?—A. It might not be likely, but it would be possible.

Q. It would be what?—A. I say it could be possible. It might not be likely.

Q. You knew it was unlikely?—A. Well, yes.

Q. Highly unlikely?—A. Highly? I would not say that.

Q. Did you think that if Thiel got the money from Dr. Viehaus, Dr. Viehaus was also the one who sent him over on a submarine?—A. That thought has not occurred to me.

Q. You did not think of that when you put down on the statement the part you have just read on page 5 there, concerning Thiel getting the money from Dr. Viehaus?—A. Will you please repeat your last question?

Q. I say that thought did not occur to you when you
643 put down in the statement there that Thiel might have gotten the money from Dr. Viehaus or Mr. Viehaus?—A. Well, that thought has come to my mind, but I have not taken it as a probability.

Q. Isn't it the fact, sir, that you knew and knew all along that Thiel's money came from the German government?—A. No, sir; it is not.

Q. And nowhere else? Isn't it a fact that as you were giving this statement, as you have it before you, to the FBI, it occurred to you that perhaps you had admitted too much?—A. No, sir; it has never occurred to me.

Q. Didn't it occur to you, sir, that when you got to this stage in the statement, the very page, page 5 there—didn't it then occur to you that perhaps you had admitted too much by admitting that you suspected Thiel had the money from the German government, and so you brought in these other statements about Thiel getting the money from Dr. Viehaus and other prominent persons, to cover up the admission you made and modify it?—A. No, sir; it is not.

Q. That is not your reason for doing it, you say?—A. That is correct.

Mr. CORREA. I am at a good place to pause for the recess, Your Honor.

643-A The COURT. We have to take a recess in this case to a quarter to 3. I have two other hearings in reorganizations set down and advertised a couple of weeks ago, and I cannot adjourn them. We will recess to a quarter to three.

(Recess to 2:45 p. m.)

644 AFTERNOON SESSION

2:45 p. m.

ANTHONY CRAMER resumed the stand.

Cross-examination continued by Mr. CORREA:

Q. Now, Mr. Witness, you were here when Mr. Willis testified, sir?—A. Yes, sir.

Q. And did you hear Mr. Willis testify on cross-examination by your counsel that when he opened your safe-deposit box there was in it 61 $50 bills in an envelope in the center of the box, and five $50 bills in one corner of the box and four $50 bills in another corner of the box. Do you recall that?—A. Yes; I do recall his words.

Q. Do you recall counsel stated what he wanted to bring out was that there was a place in the box where there was a separate pile of $200?—A. Yes, sir.

Q. I think that was just about the way the question was put. What I want to bring out is that there was a separate pile of $200.—A. Yes, sir.

Q. Have you made a statement at any time that the separate pile of $200 represented money which Thiel had repaid to you?—A. I think I did, but always made the provision that I was not quite sure about the money; how I put it.

Q. That again is not what you told the FBI, is it?—A. I do recall very little of that.

Q. You mean you do not recall whether that is what
645 you told the FBI, or not?—A. That is correct; yes, sir.

Q. Let me show you your statement which has been marked as your "Exhibit C" in evidence, and I particularly direct your attention to page 6, and the first full paragraph on that page. You might read that through and see if that refreshes your recollection as to what you told the FBI. on that subject [handing exhibit]. Does that refresh your recollection, sir?—A. No; it does not.

Q. You mean to say this statement does not refresh your recollection as to what you told the FBI?—A. How I put the money and in what condition it was when I left it in there, I do not recall at all today any more.

Q. My question is, does the statement refresh your recollection as to what you told the FBI?—A. It does not; no, sir.

Q. Are you sure you understand my question?—A. I do, sir.

Q. In other words, even after having read your statement, you still do not know what you told the FBI, is that it?—A. Ever since I have made this statement to the FBI I paid no more attention to it, because I have not thought about it any more.

Q. So what you are telling us now is that you do not know whether this statement is what you told the FBI or not?—A. No. You must be misunderstanding me.

646 Q. I guess I am.—A. Pardon me. That at the present moment I do not recall my statement to the FBI.

Q. But does not this statement—and when I say "statement" I refer to the typewritten statement before you—does not that set forth what you told the FBI?—A. Well, I must have told the FBI, but I do not recall it now.

Q. Isn't it the fact, sir, that you told the FBI that all the money in the safe-deposit box except $100 was Thiel's?—A. According to this statement; yes.

Q. Do you know that you told the FBI that?—A. I will not deny that; no.

Q. You signed your name on that page, didn't you, sir?—A. I did; yes, sir.

Q. In fact you made a change in a paragraph right above the one I am reading from, is that correct?—A. That is correct.

Q. With your own initials?—A. Yes, sir.

Q. And was that statement the fact at the time you made it?—A. I cannot tell you yes or no, because I do not know it now any more.

Q. So you do not know now whether what you stated to the FBI was the fact or not? Is that what you are telling us?—A. I

have told Mr. Willis at the very first beginning that I have been very confused about the money and that it might be so or
647 might not be so, as to the position I put the money in.

Q. Well, sir, let me ask you while we are on the subject, what is the significance of the $450, that is one pile of five $50 bills and another pile of four $50 bills, which was left out of the envelope?

Mr. MEDINA. I object to the form of that question, Your Honor.

The COURT. I think that is a proper question.

Mr. MEDINA. I do not see how he can tell the significance. Evidently, what I was thinking, how he could know that I do not know.

The COURT. He is the one who put the money into the box.

Mr. MEDINA. Yes. I did not think the question was addressed to that, Your Honor, but perhaps I am wrong.

Mr. CORREA. I will withdraw it. I thought I made the point clear, but I will try to make it more clear.

648 Q. Let me ask you it this way, Mr. Cramer: What did you have in mind when you put 61 of the $50 bills into the envelope and left 9 of them out of the envelope?—A. Well, I believe that is stated in my memorandum.

Q. Now you just tell us, if you will, what you had in mind.—A. I found eight gold notes, and I left them, as much as I do recall, out of the envelope. That is all I do recall about it.

Q. Well that leaves us another bill of $50 which was also left out of the envelope.—A. Well, I don't know that.

Q. What did you have in mind when you did it that way?—A. Well, to have them separated, as much as I do recall, because they were gold notes.

Q. Yes; but your counsel brought out, I think, from you yesterday, certainly from Mr. Willis—I am sure from you—some of the gold notes were in the envelope among the 61 and some were out of it.—A. I do not know that.

Q. I think that was brought out yesterday on your examination. We will see if we can find the place. I am sure that was brought out.—A. All I do recall is that I separated the gold notes.

Q. As I understand it, sir, some of the nine bills left out
649 of the envelope, some were gold notes and some were not.—A. Are you positive about that, Mr. District Attorney?

Q. That was Mr. Willis's testimony, I am pretty sure, and I think it was brought to your attention yesterday by Mr. Medina.—A. I heard him say that; yes, sir.

Q. And I think you answered a series of questions about it. Now I am checking the minutes to find the specific place. Yes, at page 561 of the minutes you were asked—well, I will start at

page 560, because I think that makes the point clearer. You were asked this: "Q. Can you say this, that you put most of the money in the brown envelope?—A. Yes, sir; I did." Do you remember that question and answer?—A. Yes, sir.

Q. Then the next question:

"Q. That left a certain number of bills that you did not put in the brown envelope, Defendant's Exhibit G?"

And you answered, "Yes, sir." Correct?—A. Yes.

Q. Then the next question: "Q. And I ask you if you have any recollection of how you arranged them; these other remaining bills in that box?" And you answered, "A. As I do recollect, I had three $50 bills piled in a corner and four or five gold notes piled in the other corner, and the rest of the money was in
650 the envelope. That is my recollection."—A. Yes, sir.

Q. Is that your recollection?—A. As I can see, yes.

Q. Then the next question: "Q. Well, I don't want to seem to be stupid about it, but I do not quite understand why, where there were eight gold notes, you should put four or five of them in one pile and the other three or four inside the envelope. Was there some reason for that?" And your answer was: "No; but my recollection is very vague about this subject. I am not positive about it."—A. Well, that is correct; yes, sir.

Q. Now, sir, what I am getting at is this: What was your purpose in leaving any of the bills out of the envelope?—A. Well, the purpose for that, as I can recall it, was that some of it was mine and the rest was Thiel's money, and that I wanted to keep the gold notes separated; and how it has been done, I do not recall that any more. That is all I can state on that. I do not recall anything more, and I can say with honesty and sincerity that there was no other purpose attached to that.

Q. Was any part of that money or all of it that you left out money that was going to be paid to you for something that
651 you were doing or going to do for these men?—A. Nothing at all; no, sir.

Q. You left out $450, did you not?—A. I don't know that. I must have left it out.

Q. And you have no other explanation than the one you have given; is that right?—A. That is all I know about it; yes, sir.

Q. Now there has been introduced in evidence here, Mr. Witness, a letter that you wrote to Thiel under date of November 25, if my recollection serves me, of 1941. Is that right?—A. I think it is.

Q. You remember that letter, don't you? I think it is Exhibit—I refer to Exhibit 68 in evidence [handing to witness] which you note is dated November 25, 1941. Am I right, sir?—A. Yes, sir.

Q. Now isn't it the fact, sir, that you wrote other letters to Thiel other than the one you hold in your hand at the moment?—A. Yes, sir; I did.

Q. As a matter of fact you refer in that letter, do you not, to having written him, I think you say twice before?—A. Yes, sir.

Q. And isn't it the fact, sir, that the other letters that you wrote to Thiel were also critical of the United States?—A. Not critical of the United States, but I had been critical about certain persons.

652 Q. Didn't you write letters which were unfriendly in tone to the United States, to Thiel, prior to the one of November 25th?—A. Never unfriendly to the United States. To certain persons, I repeat that.

Q. Well, sir, is it not the fact that irrespective of what you wrote to Thiel, that during 1941 you did write several letters to Germany in which you discussed the United States in an unfriendly manner?—A. I do not know that.

Q. Well, what is your recollection? I want you to search it on that subject.—A. The letters I have written to Thiel were more or less of a purely personal matter and politics was little discussed in it.

Q. You say you discussed politics very little in your letters to Thiel?—A. Yes, as I do recollect.

Q. A considerable part of this letter is taken up with a discussion of politics, isn't it?—A. I do not remember the contents of the letter.

Q. Take a look at it and see if it refreshes your recollection.—A. Well, this is the letter where I had discussed politics I believe more than usual.

Q. This is more than usual; is that right?—A. That is correct.

Q. Now, sir; isn't it the fact that you did write to Germany in the year 1941 several letters in which you discussed the

653 United States in an unfriendly manner?—A. I do not know unfriendly. I would say that I have criticized a few persons. I have never criticized the United States as such.

Q. Now, sir, during the year 1941 didn't you receive letters from your nephew Norbert?—A. Yes, sir.

Q. Now isn't it the fact, sir, that Norbert's father—that was your brother, wasn't it?—A. That is right.

Q. Through Norbert warned you that your letters discussed the United States in such an unfriendly fashion that Norbert's father feared that you would be put on the blacklist, because according to him the letters went through an American censorship?

Mr. Medina. I object to that question as improper and that the very wording of the question is such that I move for a mistrial.

The Court. Motion denied.

Mr. MEDINA. What is your Honor's ruling?

The COURT. The motion is denied.

Mr. MEDINA. Exception. What is your Honor's ruling on my objection?

The COURT. Overruled.

Mr. MEDINA. Exception. These are letters from someone else, and I claim they are not binding upon the defendant. Your Honor realizes that, I take it.

654 By Mr. CORREA:

Q. Do you have the question?—A. Yes, sir. If there was any purpose behind it, I have been trying to show that we still have freedom of the press and thought in the United States.

Mr. CORREA. I move to strike the answer, and ask that the question be read and the witness be directed to answer it responsively.

The COURT (to witness). Can't you answer that directly? Answer that question directly.

The WITNESS. Whether it was hostile or whether it was friendly or——

Mr. MEDINA. No; the question is whether you got letters which said that.

The WITNESS. Well, I have received a letter from my nephew Norbert which mentions that, I admit that.

Mr. MEDINA. I move to strike out the answer upon the grounds on which I objected to the question.

The COURT. The motion is denied.

Mr. MEDINA. Exception.

655 Q. And does that refresh your recollection as to whether or not you had written letters to Germany during the year 1941 in which you discussed the United States in an unfriendly manner?—A. I repeat, that persons is the reference.

Q. Well, what was contained in those letters to Norbert's father, which he considered, according to your testimony, was so unfriendly as to be likely to involve you in trouble with the American censorship?

Mr. MEDINA. I object to the question as improper in form, containing erroneous assumptions of fact and as generally inadmissible and improper.

The COURT. Read the question.

(Question read.)

The COURT. I sustain the objection.

Q. How many letters did you write during the year 1941 to Norbert's father?—A. I do not recall that; at most one.

Q. At most one? It could not be any less than one, could it,

sir?—A. I usually write a letter to my folks at home once or twice a year.

Q. So at least one is what you mean, isn't it?—A. Maybe at least; yes, sir.

Q. And at most how many?—A. Well, not more than two.

Q. Not more than two. Now tell us what was in those letters by way of discussion of the United States?—A. I
656 do not recall anything about it in such a manner that I can give you an account of it.

Q. Can you recall anything you said in those letters about the United States?—A. Letters I have written home have always been full of praise for the United States, for the Constitution of the United States, and if I have been critical it was only about certain persons, and my nephew has believed that, or my brothers; rather, have believed them hostile because if you criticize a man in Germany it is a crime, and I want to show them that it is not in the United States.

Mr. CORREA. I move to strike it out, if your Honor please, and ask that the question be read to the witness and that he be directed to answer. And I may say that my question related to the specific letters he mentioned during the year 1941.

Mr. MEDINA. I would ask your Honor to consider those three separate motions of Mr. Correa severally. The first is to strike out the answer. What is your Honor's ruling as to that?

Mr. CORREA. Your Honor, lest we waste time, the motions are withdrawn and I will rephrase the question and try to get an answer.

Mr. MEDINA. I object to the comment "try to get an answer," as though perhaps the witness was reluctant,
657 which there is no evidence of.

Q. Now, Mr. Witness, what was in the specific letter or letters which you wrote to your brother and his family in the year 1941?—A. I am unable to tell you. I do not recall.

Q. And you cannot recall anything that was in those letters?—A. No, sir.

Q. Any discussion of the United States that was in those letters?—A. I do not know; no.

Q. Isn't it a fact, sir, that your letters to Thiel were in the same vein as your letters to your brother?—A. No, sir.

Q. Now, sir, is it not the fact that you were under the impression that your letters went through an American censorship?—A. No, sir.

Q. I will ask you when you state in your letter to Werner Thiel, I think it is Exhibit 68 before you——A. 68 is correct; yes, sir.

Q. That this letter is going through enemy censorship twice, so you will have to be circumspect in your discussion of the political situation over here—isn't that the substance of what you say?—A. Yes, sir.

Q. What did you mean, that the letter would go through enemy censorship twice?—A. England and Germany.

Q. You mean that you considered both England and Ger-
658 many or both English and German censorship as enemy censorship?—A. Yes, sir.

Q. You did not consider Germany an enemy; did you, in your thinking at this time?—A. Well, they are read and censored in Germany, and since I am a citizen of the United States I am considered more or less an enemy to Germany.

Q. Did you consider yourself an enemy of Germany?—A. To be frank, no; not at that time.

Q. You did not at this time, did you?—A. At that time.

Q. And you say nevertheless you felt that German censorship was enemy censorship?—A. That is correct.

Q. And you felt that Thiel, to whom you were writing, would understand that that way, is that correct?—A. I did not know if he would understand that, but that was my intention.

Q. Well, you were writing to tell Thiel, were you not, and you wanted him to understand what you wrote, didn't you?—A. Yes, sir.

Q. And you told Thiel, now this letter goes through enemy censorship twice and therefore I have got to be careful, or however you phrased it?—A. That is correct.

Q. And you felt that Thiel would understand, when you said "twice" you meant once the English censorship and once
659 German censorship.—A. I did not know if Thiel was to understand that, but that is the way I put it.

Q. And you felt he would understand that, or you would not have put it that way?—A. Well, of course.

Q. And you felt that you had to temper your discussions.—A. Pardon me.

Q. You felt you had to be careful in your discussion of American politics because if you were to be outspoken the German censors might not like it?—A. Either the German or the English censorship, correct.

Q. Stay with the German. You thought the German censorship might not like it, didn't you?—A. That is correct.

Q. Let us see what you did say: Didn't you say there, as a matter of fact "You will understand that I can toss you only small crumbs from this fodder field since this letter will probably go two times through enemy censorship."—A. Yes, sir.

Q. And when you were referring to "small crums from his fodder field" you meant, did you not, political developments over here?—A. Political developments?

Q. In this country.—A. Well, I do not know the true meaning of what I just meant then—politics in general.

Q. Well, sir, if you do not know, I am sure I do not know. Cannot you indicate to us what you meant by that
660 expression in the letter there?—A. That is more than a year passed, and I do not recall what I meant by that.

Q. Well, the writing is before you. Look at it. Maybe if you look at it in the German—it may not be well translated. Look at it in the German and see if that helps your recollection [handing].—A. (No answer.)

Q. Does that help your recollection, sir?—A. Very little.

Q. Now, sir, was it your thought that if you criticized political and national figures over here that the German censor would not like that?—A. No, the English censor.

Q. What was it in your letter that you thought the German censor would not like?—A. Well, the letter in general.

Q. That letter in general?—A. I have known instances that people wrote letters from this country and they were not permitted into Germany—that did not reach their address.

Q. And what you thought the German censor would not like was that letter you have before you in general, is that your answer?—A. Well; yes, sir.

Q. Now when you were naturalized, I think it was brought out on direct, you solemnly renounced any and all allegiance to the German Reich, did you not?—A. Yes, sir.

661 Q. And you just as solemnly swore complete and undivided allegiance to this country, didn't you?—A. Yes, sir.

Q. Now you knew in 1941, didn't you, that as a citizen you owed this country complete and undivided allegiance?—A. Yes, I knew that.

Q. And you knew that at all times since your naturalization?—A. Yes, sir.

Q. And you knew that you had renounced any and all allegiance that you had already owed to Germany?—A. Yes.

Q. Isn't it a fact, sir, that nevertheless your state of mind, so far as Germany was concerned, in December of 1941, and I refer to December 3rd, was that it was your duty to be over there fighting for Germany?—A. No, sir.

Q. Isn't it a fact, sir, that you felt unhappy and discontent because you were not in the fight on the side of Germany at that time?—A. No. I was glad about to be in the United States.

Q. Now didn't you feel that on November 25, 1941, that you were sitting over here "in pitiable comfort" when you should be in the battle on the side of Germany?—A. No, sir; I have never thought of that.

Q. Now, sir; didn't you say as much in your letter to Werner Thiel? I will read from the translation which is Exhibit
662. 68-A in evidence. Didn't you say: "Inside I am very discontent as a result of the disturbed times. We sit here in pitiable comfort when we should be in the battle. As Nietzsche says, 'I want the man; I want the woman; the one fit for war, and the other fit for bearing.' "—A. That was a time when I just had read Nietzsche and I was more or less under the influence for a few moments, but I have never really felt that influence. I have been a pacifist all my life.

Q. A pacifist?—A. Yes, sir.

Q. So although you said that, you did not mean it?—A. That was more or less a crumb of encouragement for my friend.

Q. As a matter of fact isn't that quotation from Nietzsche which you set forth in that letter there one of the principles of the Nazi party?—A. I did not know that.

Q. You did not know that, sir?—A. No. I do not know the principles of the Nazi party.

Q. So you are unable to tell us whether that is one of the principles of the Nazi party?—A. I am unable to tell you that; yes, sir.

Q. Isn't it a fact, sir, that Nietzsche is one of the philosophers whom the Nazis hold up in admiration and esteem?—A. I know Nietzsche only as a philosopher. I do not know the rela-
663 tion of the National Socialists to Nietzsche.

Q. And you do not know anything about that either?—A. No, sir.

Q. Now, sir, you say when you wrote the letter to Thiel which is dated November 25, you were under the influence of Nietzsche, is that correct?—A. At the moment I may have been; yes.

Q. Isn't it a fact, though, that you still felt the same way when you wrote the letter dated December 3rd which is addressed "Family Heinrich Cramer"?—A. May I have a German translation of that letter?

Q. You may have the original of it, sir, which I take it is what you mean, isn't it [handing]. You take the original and I will take the translation, if I may. Now look at that Exhibit 69. I direct your attention to, I think it is, about the second paragraph from the end, the second paragraph above the signature, or maybe the third. It starts "Personally I am still well and spending my days really much too pleasantly." Do you see the paragraph?—A. Yes, sir.

664 Q. I say isn't it a fact that on December 3, which is the date of this letter, it was still your feeling that you should be in there fighting on the side of Germany?—A. It does not say so in here.

Q. Sir, doesn't it say—and I am reading from the translation Exhibit 69-A, and I want you to correct me if it is inaccurate—it reads as follows in the translation: "Personally I am still well, and spending my days really much too pleasantly in view of the gigantic sacrifices which the glorious disciplined Germany army is making from day to day for the homeland"?—A. Yes, sir.

Q. Do you disagree with that translation, sir?—A. Well in substance it is correct.

Q. Now I say didn't you feel on December 3 of 1941 as you had felt on November 25; namely, that you should be over there fighting for Germany?—A. I do not see where my person comes into this.

Q. The translation I have, sir, starts "Personally I am still well and spending my days really much too pleasantly."—A. That is incorrectly translated.

Q. How should it be correctly translated?—A. That I spend my days pleasantly.

Q. Excuse me, I just want to get a note of what you say.—A. That I spend my days pleasantly.

Q. Yes?—A. And I have not mentioned my person,
665 that I have——

Q. No, please give us a translation of it first, sir, and then add your comments, so we can check the translation.—A. "And in view of the great sacrifices which are brought by the Germany army"—oh, I am—"in view of the great sacrifices that are being brought by the German army, compared to that I live in rather pleasant circumstances."

Q. Now as I understand it your translation reads as follows, and correct me if this is a mistake: "I spend my days pleasantly. In view of the great sacrifices which are being brought by the Germany army, compared to that I live in rather pleasant circumstances"?—A. That is correct; yes, sir.

Q. And that according to your testimony is a correct translation of that part of the letter; is that correct, sir?—A. Yes, sir.

Q. Now does it say anything in there about the "glorious disciplined German army" as the translation I have does, or is that too in error?—A. It could be translated like that; yes, sir.

Q. I do not want you to concede anything as to the translation, sir. Just tell me how you translate it? I just want to know what you say.—A. Well, "the grand and very obeying" I would say.

666 Q. "Grand and obeying army." I think we will take

that as "disciplined."—A. Yes; it may be taken like that.

Q. Does it say anything about the "gigantic sacrifices which the grand and well-disciplined German army is making from day to day for the homeland;" does that phrase appear in there, "from day to day for the homeland," or anything like that?—A. Yes, sir.

Q. You heard this letter read in court when it was introduced, didn't you?—A. Yes, sir.

Q. Have you made any effort to call attention to these inaccuracies, as you state them, heretofore? This particular one I refer to.—A. Previously you mean, sir?

Q. Yes, previously.—A. Well, these letters, I admit they have been read to me and I said in substance they were translated correctly; but still you can translate words in such a manner that their meaning is different.

Q. Now, sir; is it the fact that you felt at this time that you wanted a chance to do something for Germany?—A. No, sir.

Q. You did not feel so?—A. No, sir.

Q. And that is true of your state of mind at the time you wrote the Heinrich Cramer letter as well as your state of mind at the time you wrote the Henry Thiel letters; is that correct?—A. Yes, sir.

667 Q. Did your feeling toward Germany and the German army change when the United States declared war on Germany?—A. Yes, sir; I did.

Q. And did you feel thereafter the same way about the United States army as you indicated in this letter you felt about the German army?—A. Will you please repeat that last statement?

Q. I say did you feel after the United States and Germany were at war——A. Yes, sir.

Q. The same way, that is, did you feel the same way about the United States army as you had felt about the German army before the war?—A. Yes, sir; I have.

Q. You feel the same way about the United States army now?—A. I do; yes, sir.

Q. Isn't it the fact, sir, that on the contrary your feeling about the United States army was just the opposite from your feeling about the German army?—A. I have never said anything, and never had felt anything to that sentiment.

Q. Didn't you feel in April, 1942, that the United States army was misusing men who were drafted as world conquerors, as you put it?—A. That is not—I have mentioned that, but that was—that was not meant in the way you mean it.

Q. Sir, I am not attempting to give it any meaning; I am quoting. It is a translation of your letter.

668

Mr. CORREA. I ask the remark of counsel be stricken, judge, because I think it is not correct.

Mr. MEDINA. The quotation does not accord with my copy of the letter.

The WITNESS. It does not say I am——

Mr. CORREA. I have no copy different from the exhibit in evidence. It accords with that.

The WITNESS. I never used the expression you said. "Used" and you said "misused."

Q. "Misusing" I said.—A. But in German it said "used" and that is a misspelling.

Q. That is another mistranslation?—A. Yes, it is.

Q. You have not called attention to that heretofore, either, have you?—A. No, sir.

Q. In any event you now say, sir, that you did not want them to be used by the United States army as a world conqueror?—A. That is correct; yes, sir.

Q. Perhaps the term "world conqueror" was another mistranslation?—A. No, I said that, "world conqueror."

Q. Now I ask you, sir, as to that sentence of this Exhibit 63—Exhibit 63 being your original letter—again to give us what you state is the correct translation, as you seem to quarrel with our translation of it.

669 Mr. MEDINA. For the sake of clarity, your Honor, would it not be well to read first what is in the translation, so the jury can see if there is any difference in his translation?

The COURT. I think Mr. Correa can examine the witness on that.

Mr. MEDINA. Very well.

A. Well, I will say that in German it has an altogether different meaning.

Q. Give us the meaning, sir, as best you can, on that sentence; and give it to me slowly, please, as I want to write it down.—A. Well, "storming over the world" would be better in this particular meaning, in this particular——

Q. I would like a translation, sir, if you would, of the sentence you see, in which those words "world conqueror" appear.—A. Well, it would be like this: "It is not impossible that we"—including Hubert Thielmann and myself—"might become soldiers"——

Q. "It is not impossible that we"——A. We, Hubert Thielmann and I.

Q. You do not say in the letter Hubert Thielmann and you?—A. No.

Mr. MEDINA. It is addressed to Thielmann.

The WITNESS. Yes. "It is not impossible that we may become

670 soldiers yet and that we may be used by the American army, as"——

Q. You are going a little fast for me. "and that we may be used by the American army"——A. "To storm into other continents" or "to other continents."

Q. "To storm"?—A. "To other continents."

Q. "To storm into"——A. Yes, "to storm" or "storm to other continents."

Q. And that you say is a correct translation?—A. That would be about correct.

Q. Of that phrase of your letter; is that right, sir?—A. Yes, sir.

Mr. CORREA. If I may have a few moments, your Honor. This is a surprise to me, that our translations of the documents were contested.

Mr. MEDINA. I do not contest it.

Mr. CORREA. The defendant does, your Honor.

Q. Now, sir, it was your state of mind, was it not, in November of 1941, that you did not want to dirty your fingers with war materials—or, excuse me, with war work?—A. Yes; I have said that.

Q. And isn't it the fact, sir; that in April and June of 1942 you still felt the same way towards the war?—A. No, sir; I felt different.

Q. Isn't it a fact that when you met Werner Thiel in June you saw an opportunity to help Germany?—A. No, sir.

671 Q. And against the United States?—A. I never had the thought.

Q. Now, sir, you say you didn't. You guessed the very first time you met Thiel that he was over here on a mission from the German government, didn't you?—A. I had a hunch; I did not guess it.

Q. We will adopt your language, you had a hunch. You suspected that he was here on a mission from the German government, didn't you?—A. All right; yes, sir.

Q. The very first time you met him in June?—A. That is correct.

Q. You said I believe that you did not think of reporting Thiel because you did not want to betray a friend.—A. Well, that was believing that Thiel had evaded the draft board, and that I believed as insignificant, but pertaining to Thiel as a man, as an enemy of our country, I would immediately have reported him. That is my sincere truth.

Q. That is another departure, isn't it, from your statement to the FBI?—A. Yes, sir.

Q. Isn't it?—A. Yes, sir; it is.

Q. Is that another case where what you told the FBI was not the truth at the time you told it to them?—A. At the time I made these statements—pardon me, sir, to interrupt you—at the
672 time I made these statements I believed Thiel to be an evader from the draft board and nothing else. I did not know anything about Thiel's activities, and that was my state of mind, knowing Thiel as an evader of the draft board but not as an enemy of our country.

Q. Didn't you say to the FBI on June 28th, "I know that it is wrong for a person to incite unrest among citizens by spreading stories and circulating rumors during war time, but if Thiel had come over to the United States to engage in such activity I would not think of reporting him because I would never betray a friend"——A. That was wrong.

Q. "If I did I could never respect myself."—A. That was wrong.

Q. My question is now did you say that to them, sir?—A. Yes, sir; I did.

Q. As a matter of fact you made a change in that very sentence, didn't you?—A. Where?

Q. The second word. It read "I knew" and you changed it to "know" and initialed it, didn't you?—A. That has been called to my attention. I did not know; I have not done that deliberately.

Q. You mean you did not make the change deliberately?—A. That has been called to my attention, as much as I recall.
673 I believe on the suggestion of an FBI agent. I never have paid any attention to the correction of that statement. Where it should be "I know"——

Q. Which agent suggested that you make that change?—A. I don't know. Some of the agents.

Q. Can't you recall which one?—Was it Mr. Willis?—A. I cannot be positive whether it is Mr. Willis or someone else.

Q. Can't you describe or give us some indication of the man you say told you to make that change?—A. No, sir; I don't recall that, the person. "I knew it" has been suggested to me.

Q. Sir, in any event you saw that statement in there, didn't you?—A. Yes; sir.

Q. When you signed the writing?—A. Yes, sir.

Q. And you now say to us that although you made that statement to the FBI it was not true?—A. I am quite in doubt about your last sentence. Will you please repeat that?

Q. You now say, sir, that although you stated that language there, that sentence to the FBI, it was not true?

Mr. MEDINA. May it please the Court, may it be clear that what the question relates to is the hypothetical statement of what he

would have done if something. I think that is what is causing the trouble.

674 Mr. CORREA. If your Honor please, there is a sentence there in his statement which he signed, and the particular sentence itself is initialled. I understood the witness to say although he gave that statement and signed it and initialled it, he does not mean it now. I want to know what the fact is, whether he gave a deliberate untruth to the FBI or what. I think I am entitled to know it too.

Mr. MEDINA. If your Honor please, I do not like to interrupt, and I do very little of it, but when you ask a person what he would have done if in the future, I do not see how anybody can speak of that as a fact? I really don't.

The COURT. It may indicate intention or state of mind, certainly.

Mr. MEDINA. It is a hypothetical state of mind.

The COURT. That may be.

Mr. MEDINA. If that is a fact I am learning something here today. I do not understand that, and I think it is a speculation.

The COURT. I suggest, so the jury may understand it, that you read that statement from the paragraph that you indicate.

By Mr. CORREA:

Q. The statement is—and I ask you to follow on
675 the original exhibit, please, Mr. Cramer—the statement reads: "I know that it is wrong for a person to incite unrest among citizens by spreading stories and circulating rumors during war time, but if Thiel had come over to the United States to engage in such activities I would not think of reporting him because I would never betray a friend. If I did I could never again respect myself."

A. As much as I do recall—pardon me, sir—this has been suggested to me by Mr. Willis, to add to that, and at the time I did sign this I was not aware of the consequences.

The COURT. Was that true?

The WITNESS. Pardon me?

The COURT. Was it the truth or not?

The WITNESS. It is not the truth. I would have reported him.

Mr. CORREA. The witness understands perfectly well, your Honor.

Mr. MEDINA. It remains an hypothesis and not a fact, your Honor.

Mr. CORREA. I think the witness understands it.

The WITNESS. May I ask you a question, Mr. District Attorney?

By Mr. Correa:

Q. No, sir; you may not. I prefer that you answer my
676 questions and answer them as truthfully as you are able to.—A. Yes; I do.

Q. Now you say Mr. Willis suggested this language?—A. As much as I do recall; yes, sir.

Q. Did you tell Mr. Willis at the time "Well that is not the truth, I would report a friend of mine," as you just told us here?—A. Well, I was in doubt about the state of mind. I would have had if I had known, and so I simply thought that this was the best way to express myself.

Q. Did you indicate to Mr. Willis that you were in doubt about this?—A. Well, I do not recall that.

Q. Can you recall whether you indicated that or not, sir?—A. The whole thing was done, I do know that, because I was ignorant of anything that had happened and what was to come of it and these statements I made.

677 Q. Now, sir; this statement was taken after your interview with Mr. Ostholthoff, wasn't it?—A. Yes, sir.

Q. And didn't you tell us just yesterday afternoon near adjournment time as follows concerning your interview with Mr. Ostholthoff, and I quote from page 577 of the minutes:

"Mr. Ostholthoff told me 'Cramer, you don't seem to realize in what a serious thing you have been involved.' Well, then it dawned upon me that something might have been radically wrong. 'Well,' I said, 'if that is the case I am going to tell all I know about it,'"?—A. Yes, sir.

Q. You realized at the time you made this statement, didn't you, that there was something very wrong, as you put it?—A. Yes; but not to the extent it has proven to be.

Q. Is it your testimony, sir; that you only tell the truth when you feel that the matter may involve you in some serious consequences?—A. No, sir; but this whole thing is so conflicting because—I have never been able to look behind it and see what was going on.

Q. Well; in any event, you say now that if you thought your friend Thiel was over here for the German government to circulate rumors, you would have reported it?—A. Yes; I would today any time.

Q. Contrary to what you say in this statement, right?—A. Yes, sir.

678 Q. Well, now, sir; you did have a hunch the moment you saw Thiel that he was here on some mission for the German government, didn't you?—A. No, sir; I did not.

Q. Now you told me that five minutes ago, didn't you, sir?

Don't you remember?—A. That he was on a mission for the government?

Q. That was my understanding of it, sir.—A. No, sir; I have never said that.

Q. Didn't I use the word "guess" and you corrected it and said you had a hunch?—A. That he had come by submarine.

Mr. CORREA. I wonder if the stenographer could read that back.

Mr. MEDINA. My recollection is the same as Mr. Correa's. The question was, did he have a hunch he was here on a mission for the German government, and my recollection agrees with Mr. Correa's.

The COURT. I do not recall his mentioning the word "submarine."

Mr. MEDINA. I am willing to proceed upon the assumption the record would so read. Perhaps it was an inadvertence, I do not know, but I am willing to proceed on the assumption that is what he said.

The COURT. We do not want to proceed on the theory it was an inadvertence.

679 Mr. CORREA. I should not think so.

The COURT. You could hardly substitute "submarine" for a German mission.

Mr. MEDINA. I am merely trying to help, your Honor, instead of waiting to get the other stenographer to come back. I am saying my recollection is the same as Mr. Correa's. How can that be hurtful.

The COURT. We do not want to guess about it. We are sending for Mr. Friel. You need not hold up the trial.

Mr. CORREA. While we are waiting for that, if I might check a moment, I would like to check these translations. I think I can examine the witness on another line, on the second translation which is the one I have here.

Q. Now, sir, isn't it a fact, referring to Government's Exhibit 63 in evidence—you recall that is your letter to Hubert Thielmann, isn't it [handing], and it is in German, isn't it?—A. Yes, sir.

Q. Now I refer to the original exhibit, and is it not the fact that in the translation you gave, you omitted the entire first line of that paragraph, sir: "Ess ist"?—A. Well, yes. I said "It is not impossible." Didn't I say that?

Q. Excuse me. You are quite right, but did not you
680 leave out the phrase which follows, starting the second line of the paragraph, and the phrase starts "Was ich"?—A. "Which I personally would not quite approve."

Q. "Or personally would not like." Isn't that true?—A. Well, it is the same.

Q. And you said "It is not impossible" in your translation, "that we may be 'used' " and you took issue with our translation which you said the word "misused." Does not the word appear here at the third line of the second paragraph? Does not it there appear as the word "missbraucht"?—A. Yes; it does.

Q. And doesn't that mean "misused"?—A. Well, it could be translated both.

Q. How else could it be translated?—A. There are slight differences in German.

Q. Well, just tell me how else it could be translated from there any other way in that context?—A. Well, we could say—well, isn't there a difference between "abuse" and "misuse"?

Q. The word was translated "misused" in the translation the Government put in evidence, and that is what you took issue with.—A. Yes; but that would in English be the equivalent of a slightly lesser degree than "abuse."

Q. How would you translate the word other than "misuse"? You quarrel with our translation.—A. Well, I don't know
681 at the present time a better word for that than "abuse".

Q. "Abused" or "misused"?—A. There is a slight difference in German in those words.

Q. Now, sir, the other point on which you took issue with our translation was, you said that "we may be used by the American army to storm into other continents," whereas our translation says "as world conquerors." I call your attention to the words "als welteroberer," and does not the "als" mean "as" and "welteroberer" "world conqueror"?—A. There are different translations for that. My translation for that would be as stormers of continents.

Q. I don't want to carry this to extreme, but does not "welt" mean "world"?—A. That is correct.

Q. And "eroberer," "conqueror," doesn't it?—A. Yes; you could use that.

Q. So that it means your quarrel with our translation is not so great as it appeared before, isn't that correct, sir?—A. Well, I said in substance it is correct, but if we want to quibble about it, that is not quite as correct.

Q. Pardon?—A. In substance I have admitted it is correct.

Q. And what you omitted from your translation was the phrase "I personally would not like being misused," isn't that what
682 you omitted from your translation?—A. I am not aware of that.

Q. Your translation as I wrote it down when you gave it was that it is not possible that we become soldiers in and that we may be used by the American army to storm into other continents?—A. Yes, sir.

Q. Didn't you omit from that translation the phrase——A. According to your writing; yes; I have omitted it.

Q. Do you dispute my writing of this, sir?—A. No, sir.

Q. Didn't I take it down correctly?—A. I think; yes, sir.

Q. Would you say then, sir, that what you stated in April of 1942 was that "personally I should not care at all to be misused by the American army as a world conqueror"?—A. Well, that was due to my mature age. If I had been twenty or ten years younger I would have volunteered to the American army.

Q. It did not have to do with some notion you entertained that the American army was engaged in a world conquest of which you disapproved?—A. No; as an American citizen I have always deemed to do that which my government wants me to do.

The COURT. Mr. Friel is here with his notes.

Mr. CORREA. I should like to have that particular part read back so I can continue on that line which I was on before. I

683 asked the witness, now you guessed the first time you saw Thiel, didn't you; that he was here on a mission for the German government, and he corrected me.

(The stenographer read the question and answer as follows:

"Q. You guessed the very first time you met Thiel that he was over here on a mission from the German government, didn't you?—A. I had a hunch; I did not guess it.

"Q. We will adopt your language, you had a hunch. You suspected that he was here on a mission from the German government, didn't you?—A. All right; yes, sir.")

Q. Now, sir, is that the fact, your testimony which you gave here a moment or two ago, which was just read back?—A. Well, I thought you had asked me if he had come in a submarine, but I have been wrong according to his statement.

Q. In other words, that is not the fact?—A. The fact remains that I have understood or have been meant to say that he came in a submarine, and that I have had a hunch.

Q. Didn't you have a hunch that Thiel was here on a mission for the German government?—A. No, sir; I did not have a hunch on that.

Q. You did not have that hunch?—A. No, sir.

Q. Or suspicion?—A. No, sir.

684 Q. Or guess or surmise?—A. The only hunch I had was that he had come by submarine.

Q. Did you feel, sir, that it was your duty to report to the authorities of the United States any person who had come to these shores in time of war by submarine?—A. I wanted to wait the time until Thiel told me what he was up to, and then I would have decided and I would have reported him.

Q. That is what you thought, that you might well have to re-

port Thiel, but you were going to wait and pass o the facts yourself; is that correct?—A. Well, I wanted to hear what he was here for, and what he had to say because he had promised that he would tell Norma Kopp and me as soon as Norma came into town.

Q. Then coming back to my question, do I take it correctly that it was not your feeling that as an American citizen you had a duty and obligation to report any person who came to these shores in time of war in a submarine?—A. I have not paid any thought to that at all, whether I was to report him or not.

Q. You just did not consider whether it was your duty to do so or not?—A. It did not occur to me.

Q. And you did not consider it?—A. Well, I have not had the thought.

Q. Now, sir, when you had a hunch Thiel came here in
685 a submarine, was it your hunch that he came here on an allied submarine or German submarine?—A. In a German submarine.

Q. And I press you further on that point: did not the thought ever cross your mind: now here is a man who has come here on a hostile submarine in time of war and I ought to call his presence here to the attention of somebody in the authorities?—A. No, sir; that thought has never occurred to me.

Q. That thought never crossed your mind?—A. No, sir.

Q. Now didn't you feel, sir, that at the very least, even assuming he was your friend, and I take it you did not want to turn him in unless there were reasons; is that right; and solid reasons?—A. I have not even given that matter consideration.

Q. Didn't you feel this, sir, at least, that at least you ought to disassociate yourself from the man and have nothing more to do with him?—A. I suspended the doubts because I knew he was going to tell me, and then act.

Q. In other words, you had no objection to associating with a man whom you suspected of having come here on a hostile submarine, and a man whom you knew to be a violent Nazi?—A. I have never known Thiel as a violent person.

Q. Well, to be a Nazi; we will strike the "violent".—A.
686 Yes; but the very first time he met me he said "I am anti-Nazi," but I doubted that statement a little, and later on he tried to confuse my mind by saying several things which led me to conclude he had more or less gotten away from the Nazi party and that he had come to this country as fleeing from Germany.

Q. And what did you feel, that the German government had put a submarine at his disposal for that purpose?—A. No, sir; that somehow by pretending and telling lies he may have gotten away.

Q. Is this what you felt about Thiel what you are telling us now?—A. Yes, sir.

Q. You never told the FBI anything like that, did you?—A. I do not remember.

Q. Oh, don't you perfectly well remember, sir, that you never told them anything remotely like that?—A. Yes, I have told them the very first time that Thiel told me when he saw me, "My name is William Thomas and I am anti-Nazi," but I have made the remark "I do not quite believe that statement", that he was sincere.

Q. When did you tell the FBI that, and to whom did you make the statement?—A. Well, I believe to Mr. Willis.

Q. And when and where, as closely as you are able to recall?—A. As much as I do recall, the very first night.

Q. The very first night. Was Mr. Ostholthoff present?—A. I do not think so.

687 Q. Was anybody else present or just Willis alone?—A. Well, I do not recall the incidents. I do recall vaguely though that I have said that.

Q. I want to know when you told Mr. Willis or any other agent of the FBI, for that matter, that Thiel said to you when you met him "I am anti-Nazi"?—A. I am unable to tell you positively when it was and to whom.

Q. But it is your recollection it was Mr. Willis, is that right?—A. Yes, sir.

Q. Now when Thiel told you that, according to your testimony here, what Thiel said was, and I am quoting your words on the witness stand from the record, page 516:

"Remember now my name is Bill Thomas and I am anti-Nazi—I am anti-Nazi." And you say you think Thiel was trying to persuade you that he was really anti-Nazi.—A. Well, he tried to confuse me throughout his conversation. I have noticed that.

Q. Do you think, when he said to you "I am anti-Nazi" and repeated that over, he was trying to persuade you he was really anti-Nazi?—A. Well, his motives behind it I did not know.

Q. What was your appraisal of that at the time?—A. It sounded rather dubious to me then and later on when he made different other statements——

Q. I am just asking about that statement at the moment,
688 if you will stay on that with me, please now. He told you, "I am anti-Nazi." He said "Remember, my name is Bill Thomas." Did you think he was trying to persuade you his name was Bill Thomas?—A. The very first time he told me "My name is Bill Thomas, and I am anti-Nazi."

Q. Did you think he was trying to persuade you his name was

really Bill Thomas?—A. Well, I knew his name to be Werner Thiel but he could have assumed the name, of course.

Q. In other words, he was telling you the name he was assuming and wanted you to keep it in mind, is that right?—A. That is correct.

Q. And wasn't he also telling you the pose he was assuming in the same breath practically?—A. Well, he may have been doing that, or trying to convey that to me.

Q. Now you stated in the course of your direct testimony that Thiel told you later on that same evening of June 22nd that he had had a good chance to get away from Germany and took it; that he wanted to be back in America; that he was going to settle down here and get a job as a machinist, and I think all those statements are set forth on page 523 of the minutes. Now are those statements a fact?—A. Yes, sir.

Q. In other words, did he tell you that?—A. Yes; he did tell me that.

689 Q. Did you state at any time to the FBI that Thiel made any such statements to you?—A. I do not know. I do not think so.

Q. What do you say?—A. I do not know; I do not think so.

Q. Don't you know you did not, sir?—A. I have stated very little of the things to the FBI.

Q. You told the FBI that you asked Thiel why he had come over here, didn't you?—A. Yes, sir.

Q. And you told them what his response to that question had been?—A. Yes, sir.

Q. And you did not give them any such statement as you made here on the witness stand, did you?—A. (No answer.)

Q. Did you?—A. I do not know; I do not think so.

Q. Let me refer you to page 6 of your statement, at the top of the page. Don't you say there—it is the first full sentence, the sentence beginning at the first line of that page:

"I had a hunch that Eddie was here for the same reason that Thiel was, but I did not ask him inasmuch as the previous two times I had asked Thiel why he was here, and he had put me off with a smile."—A. Well, that is wrong, because I do remember that I asked him the very first time I saw him, if you

690 came over by submarine, and he gave me a startled look and smiled and said "Some other time I will tell you all about it."

Q. That is also set forth in the statement.—A. It is not in here.

Q. It is at another place, isn't it, sir?—A. Is it at another place? I do not know, but that was the very first statement he

made. And in the statement there is not the questions he asked me about Normia Kopp.

Q. But this specific statement which I have just read, which is a statement of fact and not hypothetical or speculative or anything else, that statement which you made to the FBI is not true, according to your present testimony?—A. Which statement do you mean?

Q. The statement that on the previous two times that you had asked Thiel why he was here he had put you off with a smile?—A. Well, he said certain words which I have omitted. The very first time he said "No, some other time I will tell you all about it," and when I asked him again he said "I had a good chance to get away from Germany and I took it."

Q. In your statement you say he put you off with a smile, and in your statement to the jury in this courtroom you say he told you he had had a good chance to get away from Germany and he took it?—A. Yes.

Q. Which is the fact, sir?

Mr. MEDINA. I object to that, your Honor.

691 A. Both of them.

Mr. MEDINA. There is no inconsistency at all.

Mr. CORREA. Now, if your Honor please, I do not know what inconsistency is if this is not inconsistent.

The COURT. I think what he says here is the alleged inconsistency.

Mr. MEDINA. I do not object to calling it an alleged inconsistency, but as I listened, both of the statements are putting him off.

The COURT. Well, the jury can decide that. They are the only ones to decide that.

Q. You never told the FBI anything about Thiel being a refugee over here, did you, sir?—A. I do not know. I think I have told them that.

Q. Whom did you tell in the FBI, and when, and where?—A. I told them immediately that Thiel had been—that the draft board had been looking for Thiel and that he was trying to evade the draft board. I have told them that.

Q. Yes?—A. And what else do you want? Thiel was a refugee?

Q. Yes: in the sense that he had escaped from Germany. As you put it, he had seen a chance to get out and had gotten out?—A. That is what he told me.

Q. Did you ever tell the FBI he told you that?—

692 A. I do not know. I do not know if I did.

Q. Don't you know that you did not?—A. I have told them so many things I do not know which one I have told them.

Q. You mean so many different stories?—A. No, sir; things we had—I have not been able to recall the whole story but gradually I have pieced together and later on I have thought the whole matter and things which I have talked come to my mind.

Q. Now, sir; don't you think it is a pretty remarkable thing that a man who wanted to get out of Germany would find a way of fleeing by submarine?—A. Well, yes; it would seem remarkable.

Q. And isn't that the kind of thing that when you heard it would make an impression on your mind?—A. Well, yes; under ordinary circumstances it would.

Q. And this statement was taken, wasn't it, on Sunday, the Sunday following the Monday you first met Thiel; isn't that so?—A. That is correct; yes.

Q. And you say the fact that Thiel had told you that he had seen a chance to get out of Germany and taken it was not on your mind at the time you gave this statement?—A. It has been there all the time.

Q. It has been in your mind all the time?—A. Yes, sir.

693 Q. Why did you withhold that statement from the FBI, sir?—A. Well, because I thought it was really rather ridiculous.

Q. Are there any other things that you think really rather ridiculous which you are withholding from this Court and jury now?—A. No, sir; I am not withholding anything of importance. Those are the things he told me and I have told everything Thiel has purveyed and told me.

Q. Did you say you are not withholding anything of importance?—A. Pardon me?

Q. Did you just say you are not withholding anything of importance?—A. I say that I am not withholding anything pertaining to Thiel.

Q. Well, you did withhold this statement from the FBI because you considered it unimportant, is that why?—A. Well, I believed it rather groundless, ridiculous, because I, myself, doubted it.

Q. Now, sir; at this meeting you had with Thiel on June 22nd, isn't it a fact that you asked Thiel whether he had come over here to spread rumors and incite unrest rather, by spreading rumors?—A. Yes, I did ask him that.

Q. In the account of the meeting which you gave on your direct examination you did not say that, did you?—A. I have forgotten that.

694 Q. You now say you did ask him that?—A. Yes, sir.

Q. Does that mean that you did suspect at the time you put that question to him that he was here on a mission for the Ger-

man government?—A. Well, according to that I must have suspected that.

Q. Well then your answer to me a few minutes ago that you did not have that suspicion of him was not so, is that right?—A. Well, sir; I believe you are absolutely trying to confuse me.

Q. So I am absolutely not trying to confuse you, Mr. Witness. I am trying to elicit the facts from you. Didn't you say here just a few moments ago—you said first that you suspected Thiel was over here on a mission for the German government, and then you said you had misunderstood that question and you had not suspected that, and now, as I understand it, you tell me again that you did suspect that he was here on a mission for the German government.—A. The fact remains that at the time when I saw Thiel I was overjoyed in seeing an old friend, and I paid every little attention to any kind of facts, and after, and when I saw these things different, they have been suggested to me, but then I suspended all kinds of doubt until Thiel would tell me what he is here for. That is the truth.

695 Q. Let me get back to the fact, if I can: Didn't you ask Thiel at this meeting, "Are you, Thiel, over here to incite unrest by spreading rumors?" Did you ask him that?—A. As much as I do recall; yes, I have asked him that.

Q. And I say therefore you suspected at that meeting that he was here on such a mission for the German government.—A. According to that; yes, sir.

Q. Didn't you feel, well, then, he would be an enemy agent, wouldn't he?—A. If he was here for that purpose he would be.

Q. And you suspected he was here for that purpose, so you suspected he was an enemy alien, didn't you?—A. Well, I do not know if I suspected him of anything. I was suspending all doubt. I left it again until he would come and tell me, which was the time that Norma Kopp would come to the city, as he had promised.

Q. Didn't you feel, sir, that it was at least your duty to have nothing to do with a man you suspected of being an enemy agent?—A. I have never given that a thought at all.

Q. In any event, you did not try to avoid seeing Thiel again, did you?—A. No; I did not.

Q. You did not try to avoid helping him in any way, did you?—A. Well, what I have given help to Thiel was to get my money back, my two hundred dollars, and I done that for that purpose.

696 Q. Do I understand you to say, sir, that your state of mind was that you were willing to help a suspected enemy agent——A. No, sir.

Q. (Continuing.) In order to get your $200 back?—A. No, sir.

Q. You do not mean that, do you?—A. No, sir; I did not say that.

Q. Didn't you feel that the least you could do was to have nothing to do with a man you suspected of being an enemy agent in time of war?—A. I should have felt like that but I have not given it any attention.

Q. I am asking you did you feel——A. As much as I can see today; no.

Q. And you had no objection to helping a man you suspected of being an enemy agent here in time of war?—A. I have suspended all doubts, as I said before, until he would tell me.

Q. Well, what is the answer to my question, sir? I do not think that answers it.—A. Would you please repeat?

Q. I say you had no objection to helping a man you suspected of being an enemy agent?—A. Oh, yes, I would; any time. I would always object to that and never do that.

Q. But you helped Thiel, didn't you?—A. I did; yes, sir.

697 Q. And you suspected him of being an enemy agent?—A. No, sir.

Q. You said a moment ago you did, I thought.—A. This thought has been, might have been in my mind. I am not quite sure about that, and I repeat again that I have suspended all doubts until Thiel would tell me.

Q. Now isn't it a fact, sir, that you expected to see a great deal more of Thiel after this evening of June 22nd?—A. It is a fact that I was interested to have Norma Kopp see Thiel.

Q. No; but isn't it a fact that you yourself expected to see Thiel quite often again?—A. Well, next evening, Thursday.

Q. And didn't you also expect to see him whenever he needed any money?—A. I have given that thought little attention. I do not know.

698 Q. Well, you were taking his money, weren't you?—A. Yes, sir.

Q. And I understood you to say in your testimony that the arrangement was that when Thiel needed money he was to come to you?—A. That was the preliminary arrangement; yes.

Q. As a matter of fact he even asked you to keep a small amount in your apartment so that if he needed a small amount or any time he needed a small amount he could come to your apartment and see you and get it; isn't that right?—A. Yes, sir.

Q. So you did expect to see a great deal of Thiel, didn't you?—A. Well, depending on what Thiel would have told me.

Q. Now, sir; you are an intelligent man, aren't you?—A. I doubt it now.

Q. You read the Constitution of the United States very carefully?—A. Yes, sir.

Q. You know a good deal about your obligations as a citizen, don't you?—A. Yes, sir.

Q. Do you still say that you felt there was nothing inconsistent with your obligation of undivided allegiance to this country in acting as banker for this person you suspected of being an enemy agent?

699 Mr. MEDINA. If your Honor please, I have not objected because that question has been put about forty times and each time the witness said that he did not suspect it, or that he is not sure what his state of mind was. Now I do not see why, and I do not see how it helps any, he should keep tagging that onto every question, and I object to it.

Mr. CORREA. If your Honor please, the witness has been asked, I agree, about forty times, didn't he suspect Thiel of being an enemy agent, and I submit he has made about forty different answers to that question. One minute he says he did and the next minute he says he did not.

Mr. MEDINA. All I say, your Honor, is tagging that on to every question, so that each question is a double question or a triple question with that in there—that is what I object to.

Mr. CORREA. I can point out many places where he said he suspected this man of being an enemy agent. I point out, if your Honor pleases, that on direct examination we had the witness's state of mind and loyalty very widely explored.

Mr. MEDINA. I withdraw the objection.

Mr. CORREA. As to his loyalty to this country. And I think I am entitled to explore the consistency of his acts with those statements.

700 By Mr. CORREA:

Q. You have the question?—A. Pardon me, sir?

Q. Do you have the question?—A. No, sir; I have not.

(The question referred to was read as follows: "Q. Do you still say that you felt there was nothing inconsistent with your obligation of undivided allegiance to this country in acting as banker for this person you suspected of being an enemy agent?"—A. Today I know that I have acted wrong, but I did not know then that I was wrong—that I did anything wrong against my country.

The COURT. We will suspend now until tomorrow morning at half past 10.

(Adjourned to Wednesday, November 18, 1942, at 10:30 a. m.)

701 [Title omitted.]

NEW YORK, *November 18, 1942,*
10:30 o'clock, a. m.

Trial resumed.

ANTHONY CRAMER resumed the stand.

CROSS-EXAMINATION resumed by Mr. CORREA:

Q. Mr. Cramer, you testified on your direct examination, did you not, sir, that on Thursday night June 25th, when you went down to meet Thiel and he did not show up, you had a thought that he might have been arrested?—A. Yes, sir.

Q. And you stated that that thought definitely occurred to you on Friday night, when again you could not find Thiel; is that correct?—A. Yes, sir.

Q. Do you recall that you told us that your thought was that even if Thiel was arrested nothing could happen to him, inasmuch as he had come to this country with no ill purpose as far as you knew, and you thought all that could happen to him would be that he would be interned as an alien enemy?—A. That is correct. That is right.

Q. Now, sir; didn't you state to the FBI, and indeed to us here yesterday on your cross-examination, that you suspected
702 that Thiel had come here for the purpose of inciting unrest by spreading rumors?—A. Well, that was a thought which had no ground whatsoever. It occurred to me and I immediately rejected it.

Q. Didn't you suspect Thiel of being an enemy alien?—A. No, sir.

Q. At any time after you met him?—A. At no time.

Q. And anything you said yesterday to the contrary is just not true; is that right?—A. Well, by that I mean that a thought may have skimmed my mind, but I had no ground, I never investigated it.

Q. By the way, when you were with Thiel you asked him, didn't you, whether he was over here to spread rumors?—A. Yes, sir; I did.

Q. And did he come right back and say "No, certainly not"?—A. He gave me the equivalent of the answer that I was asking quite a few questions, and that among friends one should guess and not ask.

Q. So from that you concluded the answer was no; is that correct?—A. Well, I suspended all doubts, as I have repeatedly said, as he was going to tell me.

Q. In any event on Friday or Thursday, or either of these nights, when you thought Thiel might have been arrested, you never connected that up in your mind in any way with your question to him about his being here to incite unrest and spread rumors?—A. No, sir.

703 Q. Or with any suspicion as you may have entertained at any time that he was in truth an enemy alien?—A. That is correct. All I thought was if he gets arrested he could be put in a concentration camp as an enemy alien.

Q. Now, you have stated in your conversation with Thiel on one of these nights, I think the 22nd—my notes do not indicate—you took the attitude that Germany was too militaristic and partly the cause of the present war?—A. Yes, sir; I have always taken that attitude.

Q. You have always taken that attitude?—A. Yes, sir.

Q. Now, sir; is it not the fact that at least in November of 1941 you took quite the opposite position, that Germany was merely fighting for survival and that it was essential that Germany hold out?—A. Well, at the present moment it may have been, but the past of Germany was too militaristic, too uncompromising.

Mr. CORREA. May I have that answer read.

(Answer read by reporter.)

Q. Listen to the question, Mr. Witness? I do not think you understood it. [Question read.] Did you take that position in November of 1941?—A. Yes; I do not deny that.

Q. You also stated on direct that since the U. S. was attacked it is your view that the United States cannot do anything but fight and win, for you say according to the minutes, "Otherwise it
704 will be the end of our country." Is that correct?—A. Well, I do not know the "end of our country," but we cannot——

Q. I mean is that what you stated? All I am asking is that what you stated on your direct examination?—A. I do not recall that.

Q. Do you recall stating that your view since the United States was attacked has been that the United States cannot do anything but fight and win?—A. That is correct. That is my attitude today and was always.

Q. You stated on direct, I think that that has been your attitude since this country was attacked.—A. Yes, sir.

Q. Now, sir; you have listened to Axis propaganda broadcasts, I think you told us, haven't you?—A. Yes, sir.

Q. O. K. and Lord Haw Haw?—A. Yes, sir.

Q. And you know, don't you, that the Axis propaganda line is that America is not fighting a war of defense but rather one of aggression, and that America and England are seeking to conquer the world?—A. Yes, sir.

Q. You know that is their propaganda line?—A. Yes, sir.

Q. Now, is it your statement to this Court and jury that is not your position at all, that you felt sincerely that America has been attacked and must defend itself?—A. It must defend itself to——

Q. That is the statement of your position?—A. That is correct; yes, sir.

704—A Q. However, that was not your point of view in April of 1942, was it?—A. When was that, sir?

Q. In April of 1942. April of this year?—A. I do not quite understand what you are referring to.

Q. I say was that your point of view in April of 1942?—A. Yes; I understand, but you put "April 1942."

Q. I am asking you about that specific time, sir.—A. It has always been my contention that the United States must fight to win the war.

705 Q. Didn't you feel in April of 1942, that the American Army was seeking to become a world conqueror and was misusing men who had been drafted for that purpose?—A. In order to win the war we have to fight this kind of war.

Q. And didn't you feel that they were misusing men who were being drafted?—A. No, sir.

Q. So that your statement in your letter of April 1942—"I should not care at all to be misused by the American Army as a world conqueror"—does not indicate any different view on your part from the view you expressed here on your direct examination?—A. Well, that was referring to my age; although I would have gone any time and fight for the United States, which I regard my duty.

Q. Now you testified on your direct examination that Thiel, I think, on the occasion of this first meeting, you said the first meeting with him on June 22nd, showed you a draft registration card made out in the name of William Thomas?—A. Yes, sir.

Q. And you told us that you told Thiel—I don't recall your exact words, but to the effect that that was a dangerous thing for him to have, or something of that sort, isn't that so?—A. Yes, sir; that is what I thought.

Q. You never told the FBI anything about that heretofore, did you?—A. No, sir; I do not think so.

706 Q. Isn't that something you thought up for some purpose of your defense in this case?—A. To defend myself?

Q. Yes; isn't it a pure invention, sir?—A. No, sir; it is not an invention. It is a fact.

Q. Isn't it the fact, sir; that the question of Thiel using the name Thomas, was one of the things you discussed when you were giving the FBI this statement which was your Exhibit C, this statement of June 28th?—A. Yes, sir.

Q. And isn't it the fact too, sir; that in that statement you told

the FBI in so many words "I should state that when I first saw him [referring to Thiel], he told me to call him Bill, that he was now known as William Thomas. He did not explain to me why he had changed his name.—A. Then he did not.

Q. Is the "then" in the statement, Mr. Witness? You look at it and tell me. Maybe I have misquoted [handing statement].—A. What page is it, sir?

Q. Page 6. I opened it right before you. It is the last paragraph, four or five lines from the bottom.—A. "That he was known as William Thomas. He did not explain to me why he had changed his name."

Q. He does not say "then" but——A. He did tell me that later when he showed the draft card.

Q. Yes: but your statement here is without qualification
707 that Thiel did not explain to you why he changed his name, isn't that so?—A. That is correct. It says so.

Q. So this statement here, according to your present testimony, is not true, is it?

Mr. MEDINA. If your Honor please, I cannot refrain from objecting here. When Mr. Willis took the stand and testified, as everybody remembers, that the witness did explain to him he was telling those lies in the beginning to protect Thiel against this draft charge.

Mr. CORREA. That is not so.

Mr. MEDINA. But it is so.

Mr. CORREA. It certainly is not. If your Honor please, I have never heard a more basic misunderstanding about the evidence in this case. What the witness said is when he was first interrogated he said that the man with whom he had been in Thompson's was William Thomas, and the FBI said: "We know it is Werner Thiel. Isn't that so?" and he said "Yes. He is using the name Walter Thomas because of some draft charge," and then he continued to lie about Werner Thiel and said he has not been out of the country and finally he said he wanted to see Ostholthoff alone and when he saw Ostholthoff alone he said nothing about Thiel being under the draft charge.

Mr. MEDINA. May I read from the minutes, your Honor. Fortunately I have been able to find it quickly enough.
708 This is Mr. Willis's cross-examination on page 233. He continues to answer: "He did elaborate by saying that the draft board was trying to ascertain the whereabouts of Werner Thiel." And then a question by me: "And did he not indicate to you that the trouble was that Thiel had not registered for the draft and that is what was making the trouble?—A. Yes."

And then there is a good deal more to the same effect, and as I have a very distinct recollection, this witness did explain to

Mr. Willis that same evening about this draft business and that that was the reason why the name of William Thomas was used.

Mr. CORREA. Now I have stated what occurred that evening, Judge, and I point out further that the witness himself has said he never told the FBI about this. Now apparently counsel knows more about it than the witness, because his testimony at the beginning of this line of examination was that, when I asked him that, Did you ever tell the FBI this—we are not discussing a failure to register; we are discussing the testimony he gave on direct examination that Thiel or Thomas had a card made out in the name of William Thomas—I don't think this line of cross-examination should be interfered with this way, Judge.

The COURT. The jury can determine. They have heard the testimony and they will decide.

709 (Question reads as follows: "Q. So this statement here, according to your present testimony, is not true, is it?").

Q. What is your answer to that, Mr. Witness?—A. I have omitted that.

Q. What about your statement here, in the written statement which is before you, is it true or isn't it true?—A. Yes; that he told me, "My name now is William Thomas," and later on he told me the reasons for that.

Q. No, sir. Your statement here in so many words is, "He did not explain to me why he had changed his name." Is that true or isn't it?—A. He may have left out perhaps "then," and I have not been able to know the significance then when I read it.

Q. Cannot you tell me straight out, sir; whether this sentence here "He did not explain to me why he had changed his name" is true or untrue?—A. This statement is true. He did not then explain to me it should have been written.

Q. But the statement does not say "then" does it?—A. He did no tell me then, but he has told me later. I have always said that.

Q. Do you say you ever told the FBI that Thiel had a registration card made out in a fictitious name?—A. Well, I do not recall if I told him that.

Q. Did you ever tell them that, sir?—A. I do not
710 recall.

Q. Didn't you say before, before we had this argument here in court, that you did not? Are you now hedging that a little to say you do not recall?—A. No; I am not able to recall.

Q. But you say before when we started this examination that you did tell it to the FBI.—A. Did I tell that?

Q. That is my recollection of your answer.

Mr. MEDINA. No. He never said he told them. He said all along he did not tell them.

Mr. CORREA. That is what I just said.

Mr. MEDINA. That is what he is trying to say.

Mr. CORREA. No; he is saying now he does not recall.

Q. You say now you do not recall whether you told them that or not?—A. I do not recall that.

Q. Was that something, sir; that you did not consider important?—A. Well, I may not have thought about it. The fact is, and I say it again, that Thiel has told me later this is the reason why my name is now William Thomas, and he showed me in connection with those words his draft card.

Q. I just asked you, did you tell the FBI Thiel had this draft card?—A. Well, I tell you again, sir; I do not
711 recall that.

Q. I say to you, didn't you consider that important to mention that?—A. I consider it now important, but I do not think I considered it important then.

Q. Now, sir, you stated in your direct testimony that when Thiel told you on June 22nd that he had between three and a half and four thousand dollars with him in American money, you asked him where did he get it?—A. Yes, sir.

Q. That is correct, I take it?—A. Yes; as I recall.

Q. And you did do that, is that right?—A. Pardon me?

Q. You did ask Thiel that question?—A. Yes, sir.

Q. And you said Thiel answered you and said, and I quote your answer, "Well, if you have the right kind of connection you can even get dollars in Germany."—A. That is right.

Q. And was that the answer Thiel made to you?—A. Pardon me?

Q. Is that the answer Thiel made to you?—A. Yes, sir.

Q. Now again you did not tell the FBI that, did you, sir?—A. Have I signed that statement in here?

Q. Don't you know whether you did or not without looking at the statement?—A. Well, my memory is rather falacious and I do not recall that.

711-A Q. What is your recollection, unaided first; if we may have that, as to whether or not you told the FBI this statement of Thiel's which you say he made to you about "if you have the right kind of connection you can get the money in Germany," did you tell them that or didn't you?

Mr. MEDINA. The question is not whether it is in the paper but whether he told it.

A. I do not recall it. I do not know.

712 Q. You do not recall whether you told him that or not; is that right?—A. No, sir.

Q. Now, sir, isn't it the fact that what you told the FBI was that you asked Thiel more than once how he got the money and?

his answer was he would let you know later?—A. I may have asked him a couple of times, but I do recall that I asked him once and he distinctly gave me the answer "If you have the right kind of connections"—pardon me—"the right kind of connections, you can get even money in Germany; dollars in Germany."

Q. And the statement you gave to the FBI was referring to some other time and not this time; is that right?—A. I do not recall that.

Q. Look at your statement page 5, the second paragraph, about midway down. Do you see where it reads "I asked him again how he got the money. He told me he would let me know later."—A. I do not recall that.

Q. Sir?—A. I do not recall the time——

Q. Do you find the place?—A. Pardon me? Yes; I find the place.

Q. Again, as to that statement, is that so? Is that statement so, Sir? Is that the fact?—A. It may be the fact. I do not know. I do know that——

Q. Did you tell the FBI when you made this statement that it may be the fact, that you did not know?—A. Well,
713 most of the questions that were put to me were put to me in a leading manner, leading up to something which I do not know now.

Q. Who did all this?—A. Pardon me?

Q. Who did all this leading according to your statement?—A. There were several of them.

Q. Mr. Willis or some other agent? Name them; will you?—A. Mr. Willis and I believe Mr. Brown was there.

Q. Who?—A. Brown.

Q. Anyone else?—A. I do not recall the names.

Q. Well, who put the leading questions which you say misled you?

Mr. MEDINA. I object to that. He did not say any questions misled him. I do not see what there is about leading questions that is so significant.

Mr. CORREA. I do not either, Judge.

Mr. MEDINA. He did not say anything about misleading him anyway.

Mr. CORREA. It is the witness seems to think that is significant; I do not.

The COURT. Go ahead, Mr. Correa.

Q. Well, who put these leading questions to you?—A. Well, most of the questions have been asked by Mr. Willis.

Q. When you told us that business about leading
714 questions a moment ago, what do you mean, that you were

misled by them?—A. I would not say mislead, but the last statement I do recall that this was put to me in a manner—the last paragraph of my statement I made to the FBI. I do recall that these statements were put to me not in a misleading manner but in a manner that I was led up to these points and finally he wrote them down.

Q. So that you were in effect misled, that is what you are saying, isn't it?—A. I do not know that it is misled but——

Mr. MEDINA. Your Honor, that is the paragraph about if he did this would he do that, and if this happened would he do that. May that appear?

Mr. CORREA. If we are going to have any such reference to it——

Mr. MEDINA. But that is it.

Mr. CORREA. Let us have the paragraph read.

Mr. MEDINA. But when a reference is made to the last paragraph may the jury not know what that paragraph is?

The COURT. He is asked a very direct question, did he say this and was it true.

Mr. MEDINA. I think not. I thought he was asked whether there was anything said that misled him, and he said as to the last
715 paragraph he was led up to that; and all I want is to have the jury know what that paragraph is.

The COURT. You may ask him later.

Mr. MEDINA. They will forget by that time.

Mr. CORREA. I do not think they will forget, Judge.

Q. As a matter of fact, Mr. Witness, we were discussing not the last paragraph, when you got off into these leading questions, but a statement in the paragraph on page 5, weren't we?

The COURT. What is that statement? So there will be no question.

Mr. CORREA. The statement is this, Judge. It says "I asked him" referring to Thiel "again how he got the money. He told me he would let me know later."

The COURT. Now what was your question to the witness?

Mr. CORREA. My question to the witness is simply, is that statement the fact?

The COURT. That is a simple question.

Mr. CORREA. I have not been able to get an answer.

The WITNESS. All I can say is that I do not recall that.

716 The COURT. You do not recall what, whether it is true or not?

The WITNESS. No; this particular kind of question, in the manner Mr. Correa has put it to me.

The COURT. There is not anything about the manner. Those are just simple words. Did you make that statement and was it true?

The WITNESS. Yes, your Honor.

The COURT. It is a simple question.

The WITNESS. I do recall that I asked him once "Where did you get the money?" And he said——

The COURT. Speak loud.

The WITNESS. "Where did you get the money?"—And he said, "If you have the right kind of confections you can get even dollars in Germany."

The COURT. Now that is not the question you were asked at all. You were asked whether you made the statement Mr. Correa read. You are asked whether it was true or not. Take all the time you want and give us a direct answer.

The WITNESS. To that I must say I do not recall the other questions—the other answers to the questions.

Mr. CORREA. I do not know that that is an answer either, Judge.

The COURT. The jury can draw their own conclusion whether that is a direct answer.

717 By Mr. CORREA:

Q. Now, sir, is it true, irrespective of the fact of what you say now about this statement in here——A. Yes, sir.

Q. That on Monday, or yesterday—yes, excuse me, yesterday morning—you stated to your counsel here that everything in this statement was the truth? Didn't you say that?—A. My answer was too quick to that. I have not been thinking about it, the significance of the question.

Q. He took you by surprise?—A. Yes, that is it.

Q. Well, you knew you had been asked about this statement; you knew there had been testimony about this statement. Weren't you thinking about this statement throughout the trial?—A. Yes, I was.

Q. When you were asked was everything in here the truth you were not being pressed unduly for a speedy answer. You did not ask to look at the statement since, did you?—A. No, sir.

Q. As a matter of fact if my recollection now serves me you did look at it before that question was put to you, didn't you?—Yes, because you identified your handwriting on it, don't you remember?—A. Yes, sir; I looked at the handwriting.

718 Q. And looked over each page, as I recall it, because you signed each page at the bottom.—A. I looked at the handwriting.

Q. You sat there and heard your counsel read it to the jury; you remember that?—A. Yes.

Q. And read it slowly and distinctly. Do you recall that?—A. Yes.

Q. You did not interrupt him at any point and say "Just a

minute, that statement there may be the truth or not, I do not recall it," did you?—A. No, sir.

Q. You did not say to him of any statement he read out of this paper, the paper you have up there, "I am not sure that statement is exactly the fact"?—A. That is correct.

Q. But you say now——A. I would say it is only part of the truth.

Q. It is only part of the truth?—A. Yes, sir.

Q. Now isn't it true, sir, that not only is this only part of the truth but that there are statements in here which are flatly untrue? Is that true or is that the fact?—A. Are you referring to a specific statement?

Q. No, any statement you can think of in there. I just say to you there are statements in there.—A. There is one statement that is an untruth, that Werner Thiel has never told me anything on what mission he was in this country. I have never known that.

719 Q. Is that in the statement?

Mr. Medina. That is not in there.

Q. Is that in the statement?—A. Well, it is referring to a military commission—a military mission, rather, pardon me—and I have never know that; I have never had the slightest amount of certainty about that.

Q. You apparently have in mind something you said in there. If you can find it without taking too much time I would like to know what it is you are repudiating.

Mr. Medina. I may state, your Honor, there is no such thing in there. I think my memory is pretty good.

Mr. Correa. Yes, but I prefer to take the witness on his own statement.

Mr. Medina. All right.

Mr. Correa. And I think I am entitled at least to know what he tells us about this statement now.

Q. Can you find the statement you refer to, sir?—A. Well, there has been a talk—I do not know if it is in here—about my having said that I believed Thiel was here on a military mission, and I believe the statement had been made by Mr. Ostholthoff, and that is the statement, as I know, I have never made to Mr. Ostholthoff.

Q. Mr. Cramer, you are an intelligent man. You heard my my question; I think you understood it—A. If there was

720 anything in here about a military mission.

Q. I am asking you whether there are any statements in here which you now say are untrue. That has been my question. Why can't you answer that directly, and not go off into something else?—A. Yes; there is one statement, that I have asked him repeatedly about the money. As much as I do recall I asked him

only once and he said "If you have the right kind of connections you can get even dollars in Germany."

Q. And that statement is just not true?—A. That is this statement I just made is true, and the statement according to that is not true.

Q. Did you know it was not true when you made it to the FBI?—A. Well, I do not know at that time; I was very confused and I may have said things which in the light of later consideration were different.

Mr. Medina. Where is that statement, Mr. Correa?

Mr. Correa. Page 5.

Mr. Medina. That is about the money?

Mr. Correa. Yes, that is the one he just referred to.

Q. Now, sir, you stated on your direct examination, did you not, that you met Thiel on June 23rd?—A. The first time I met Thiel, June 22nd.

Q. And then you met him again on the 23rd?—A. Yes, sir.

721 Q. You stated, did you not, sir, that Kerling—that you met Kerling on the 23rd?—A. Yes, sir.

Q. With Thiel?—A. Yes, sir.

Q. That is, that you met Thiel and then Kerling came in?—A. That is correct.

Q. To the Twin Oaks Inn?—A. That is correct.

Q. Didn't you tell us before Kerling came, Thiel told you Kerling was coming?—A. Yes, sir.

Q. And that you asked Thiel "What does he want to do here?"—referring to Kerling?—A. Yes, sir.

Q. And Thiel said he wanted a change—that is, that Kerling wanted a change because he disliked Germany and had come to this country?—A. That is right.

Q. I read from the record at page 534. You never told that to the FBI; did you, sir?—A. I do not know.

Q. Well, let me get down to the gist of it. Did you ever tell the FBI that Thiel had told you that Kerling had come to this country because he disliked Germany?—A. I do not know. I cannot tell you, sir.

Q. Don't you know you didn't, sir?—A. No, sir; I do not know that.

Q. Isn't this just an invention for the purposes of this trial?—A. No, it is not.

Q. And you cannot answer my question as to whether you
722 told that to the FBI any better than that you do not know whether you told them?—A. That is right. I do not recall it.

Q. At least we can agree on this—that it is not in the statement;

isn't that so? Why don't you take my word for it, and counsel can check it against his copy.

Mr. MEDINA. I do not need to check.

Q. Now, sir, you told us on direct examination that when Kerling came in you asked him what brought him back to this country; did you not?—A. Yes, sir.

Q. And you say that is the fact; is that correct?—A. Yes, sir.

Q. And you told us, did you not, that Kerling told you why, that he came back because he did not like Germany?—A. Yes, sir.

Q. That he did not like the coercion in Germany?—A. Yes, sir.

Q. And I think you added that he liked the steaks and coffee over here; is that right?—A. Yes, sir.

Q. That is just about the opposite of what you told the FBI, isn't it?—A. I do not recall what I have told the FBI about Kerling.

Q. Look at page 5, I think it is, of your statement, sir, and tell me didn't you say to the FBI there that you did not ask Kerling why he was here because when you asked Thiel why he was
723 here Thiel had put you off? I refer to the top of page 5.

Mr. Witness, the sentence starting there "I had a hunch that Eddie was here for the same reason that Thiel was, but I did not ask him, inasmuch as the previous two times I had asked Thiel why he was here he had put me off with a smile."—A. Well, the fact is that I did ask him.

Q. And this statement here "I did not ask him" is not the fact, is it, according to your present testimony?—A. No; it is not. That is not the fact.

Q. Again let me ask you, at the time you made that statement to the FBI did you know it was untrue?—A. Well, again I say that I have paid very little attention to the statements I made, because I did not know what consequences were involved. I thought that I might go home again in a couple of days and they simply got me to get a statement what was what, and so I thought it was of minor consequence.

Q. Yes; but you mean as long as you were going home again in a couple of days it did not matter whether the statement was the truth or sheer falsehood; is that your testimony?—A. No; I did not apply my power of recollection, as I did later on, in order to find out or ponder what they really had said.

Q. Now, sir, when your counsel asked you on direct examination wasn't this statement the truth, and you did
724 not say anything about this particular statement concerning your conversation with Kerling being false. Did you?—A. Will you please repeat that?

Q. I say when you answered on direct examination here that this statement was the truth you did not make any exception of

any part of it such as the part you have just referred to, did you?—A. No, sir; I don't think I have.

Q. And you heard this statement of your conversation with Kerling read here, didn't you?—A. Yes, sir.

Q. While you sat on the witness stand?—A. Yes, sir.

Q. And you did not feel it was necessary to amend it or modify it in that respect, did you?—A. That is correct.

Mr. CORREA. I have nothing further with this witness.

Redirect examination by Mr. MEDINA:

Q. I show you this copy of the Constitution that appears in the page from the New York Times, and I also show you a paper Government's Exhibit 55–A [handing to witness]. Did you write out that paper 55–A at the request of Mr. Willis?—A. Yes, sir; I did.

Mr. MEDINA. May I read that to the jury, your Honor. [To jury.] This is like so many others of these similar papers. It says, August 12, 1942. I hereby identify a page of the
724–A New York Times newspaper dated Friday, September 17, 1937, as having been part of a newspaper obtained by me on a date which I do not recall. The lines"—and you gentlemen remember how Mr. Correa showed you the places where these ink lines appeared—"the lines appearing on the page of the New York Times were made by me in ink." Signed Anthony Cramer; Witness: John G. Willis.

725. Q. Now, Mr. Cramer, tell the jury in your own way what you recall about where you got that paper, how you happened to keep it, and what the occasion was for you putting the lines on those various provisions?—A. Well, this paper, dated September 17, 1937, I found in a wastebasket, and it struck me. I, when I saw this page of the United States Constitution which was contained in the New York Times, tore out this page and took it to my room for the purpose of studying the Constitution of the United States, and I do not recall when these marks were made. Mr. Willis suggested to me, "Are they made a year or two ago?" and I said "Perhaps. I do not quite recall."

Q. Now let me ask you there, you used the word "suggested." I don't think you mean to say Mr. Willis put the word into your mouth, do you?—A. We", as I recall, yes, he said "Are they made a year or two ago?" and I said "I do not know." I said "Perhaps a year or two ago," and I said "I really do not know."

Q. Then he merely asked you questions tending to bring out the correct answer as to when the lines were put there?—A. That is correct, as I concede, yes.

Q. Now, when a Government agent is asking questions he has

to put them in a way that will elicit the fact, hasn't he?—A. I see that now; yes, sir.

726 Q. When he asked you about the time, did he ask you when you found the paper, or when you put the lines on?—A. I am not quite sure on that. I do recall that he asked me when these lines were put on there; when the markings were put on.

Q. Before you get to the matter of putting the lines on, I want to find out from you when it was that you found the paper and tore off the page?—A. Well, as it was in a wastebasket it must have been some time in 1937.

Q. You think it was about the time of the date of the paper?—A. That is correct; yes, sir.

Q. But you are not sure about that, as I understand?—A. No; I am not positive about that.

Q. How long after your found it—or let me withdraw that and put it differently—what basis have you to tell this jury as to when you put those lines on there? How do you figure it out?—A. Well, I have only a vague recollection and I cannot actually deny that it is longer than two years, but I do recollect that I had been bending over this page and reading the United States Constitution and marking such paragraphs which struck me, I might say, as unusual. That is the whole significance of the thing. And I have not been able, after a year and a half or so after I read it, to recall any single paragraph of what it was.

727 Q. Is it a fair statement to say that you looked it over a good many times and that some time you put those lines on there to indicate the parts of the Constitution that you thought were unusual and did not understand?—A. That is correct; yes, sir.

Q. Now, let me just ask you about one of those: I notice here there is a mark of your opposite the part of Section 8 that reads, and that defines the powers of Congress, "To declare war, grant letters of marque and reprisal." Did you have any idea what letters of marque and reprisal were?—A. No, sir; I had not.

Q. Did that strike you as something you wondered about?—A. Well, it may have struck me at that time as unusual. I do not recall that.

Q. I notice you marked here another one, "No bill of attainder or ex post facto law shall be passed." Do you know now as you look at these jurors, what a bill of attainder is?—A. No, sir; I do not.

Q. Or what an ex post facto law is—A. No, sir.

Q. Did those phrases strike you as curious and phrases that you did not understand?—A. Yes, sir. It is my habit when I see a phrase I do not understand, to mark it and look into a book later in order to understand.

Q. As a matter of fact, you spent a good many quiet evenings up in your room trying to improve yourself, didn't
728 you, over all these years, Mr. Cramer?—A. That is correct.

Mr. MEDINA. That is all.

Mr. CORREA. No further questions.

Mr. MEDINA. Defendant rests.

Mr. CORREA. The Government rests, if your Honor please. No rebuttal.

Mr. MEDINA. I have certain motions which I want to place upon the record, and I think, if your Honor please, that that should be done in the absence of the jury. It may be regarded as argumentative and I do not want to get into any wrangle about that.

The COURT. Yes. Gentlemen, you may be excused for a while. (Jury retired.)

Motion for a directed verdict

Mr. MEDINA. I move for the direction of a verdict in favor of the defendant. My first ground urged in support of this application for a direction of a verdict in favor of the defendant is that the Government has failed to allege or prove overt acts sufficient to establish the alleged treason. The overt acts must themselves manifest a treasonable and traitorous purpose. This case is not analogous to conspiracy cases where there may be a
729 conviction on proof of overt acts, innocent in themselves, in the event that the requisite intent is proved.

The requirements in a treason case are that the overt acts must themselves manifest a treasonable purpose and design. For example, the act of the defendant in talking to Thiel and Kerling, and with Thiel alone, as alleged in overt acts numbers one and two, there being no evidence of what the parties talked about, in and of itself manifests no traitorous or treasonable design.

Thiel and Kerling must have talked to many persons in the period between their arrival in this country and their apprehension.

Limiting ourselves at the moment to the question of the sufficiency of these talks and the overt acts, it is obvious that such talks between the defendant and Thiel and Kerling acquired a sinister or traitorous aspect on the assumption, and only on the assumption, that the defendant harbored a traitorous intent in conferring with Kerling and Thiel. But the mere act of conferring in and of itself does not openly manifest any treason.

In support of this ground for the direction of a verdict I cite to your Honor the opinion of Judge Learned Hand in United States v. Robinson, 259 Fed. 685, where he said, at page 690, and I quote:

730 "Nevertheless a question may indeed be raised whether

the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself and getting its treasonable character only from some covert or undeclared intent. It is true that in prosecutions for conspiracy under our Federal statute it is well settled that any step in performance of the conspiracy is enough, though it is innocent except for its relation to the agreement.

"I doubt very much" Judge Hand continues, "whether that rule has any application to the case of treason where the requirement affecting the character of the pleading and proof rather accorded a season of repentance before the crime should be complete. Lord Reading, in his charge in Casement's case, uses language which accords with my understanding: 'overt acts are such acts as manifest a criminal intention and tend toward the accomplishment of the criminal object. They are acts by which the purpose is manifested and means by which it is intended to be fulfilled.'

"Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count, and of those in the second count which consist of acts that do not openly manifest any treason. Their traitorous character depends upon covert design and as such it is difficult for me to see how they can conform
731 to the requirement."

That is the end of the quotation and the end of my first ground.

As a second ground for the motion for the direction of a verdict in favor of the defendant, I urge the following with respect to the separate overt acts set forth in the indictment: as to the first and second overt acts, the alleged conferences with Werner Thiel and Kerling, and with Thiel alone, that the Government has failed to prove that the defendant did "treat and counsel" with Werner Thiel and Kerling and with Werner Thiel alone. At most the Government has shown that the defendant talked with Thiel and Kerling and with Thiel alone. No evidence has been offered on behalf of the Government of the subject matter of the conversations between those parties. Under the circumstances, even assuming that the first and second overt acts in their present form manifest treason, there has been a failure to prove part of the essential allegations thereof.

As to the third overt act which alleges that the defendant carried into his residence and there possessed and concealed for safekeeping a money belt received from Werner Thiel, I urge that there is no sufficient proof by two witnesses that he did carry a money belt into his residence; nor is there testimony by
732 two witnesses that he there concealed for safekeeping such money belt.

As to the fourth overt act, which alleges that the defendant carried into his residence, and there possessed, and concealed, the sum of $160 received from Werner Thiel, it is urged that there is no sufficient proof by the testimony of two witnesses of the act of the defendant in carrying said money into his residence. Nor is there sufficient proof by two witnesses that he there concealed for safekeeping such sum of money.

As to the fifth overt act, the writing of a letter to Norma Kopp, it is urged that there is no proof by two witnesses of the writing of said letter.

As to the sixth over act which alleges that the defendant went from his residence to the Corn Exchange Bank on East 86th Street, carrying a large sum of money for the purpose of placing said money in a safe-deposit box and holding it there for safekeeping, it is urged that there is no proof by two witnesses of any fact other than that the defendant walked from his home to the Corn Exchange Bank on the day in question. There is no proof by two witnesses that he was then and there carrying a large sum of money for the purpose of placing said money in a safe-deposit box and holding it there for safekeeping.

As to the seventh overt act, that the defendant placed the
733 sum of $3,500 in a safe-deposit box in the Corn Exchange Bank, and did then and there possess and conceal the same for safekeeping, I urge again that there is no proof by two witnesses as required by the Constitution, and the terms of the statute, of the allegation that he placed the sum of $3,500 in said safe-deposit box and that he did there possess and conceal the same for safekeeping.

As to the eighth overt act, the alleged delivery of a note to Werner Thiel at the Commodore Hotel, on June 27, 1942, it is urged that the Government has failed to produce two direct witnesses to the whole overt act; namely, the leaving of the note at said Commodore Hotel.

With respect to the ninth overt act, that the witness Norma Kopp on June 27, 1942, accompanied him from his residence to Thompson's cafeteria in the City of New York for the purpose of complying with instructions from Werner Thiel, I urge that the Government has failed to produce two direct witnesses to the whole overt act.

I make the same contention with respect to the allegations of the tenth over act, the alleged false statement to the agents of the Federal Bureau of Investigation, namely, that again there has been a failure to produce two direct witnesses to the whole overt act.

And I need not add, in conclusion, as I am sure Your Honor

734 is well aware of the fact, that statements by the defendant cannot under the constitutional definition and the statute supply the proof. No statement by any defendant may do that. That is the rule in treason cases. It must be direct evidence by the prosecution of the overt acts by two witnesses. We say to Your Honor that the Government has not supported that; that as to not one single item of the overt acts alleged has there been compliance with the rule of the two direct witnesses to the alleged overt acts.

Denial of motion for directed verdict

The COURT. Mr. Medina, your motion for the direction of a verdict in favor of the defendant is denied.

Mr. MEDINA. May I note an exception.

The COURT. Oh, certainly. There are certain overt acts charged in the indictment which should be dismissed because of failure to substantiate them by two witnesses.

Mr. CORREA. On the matter of the overt acts, if Your Honor please, I did not interrupt counsel because he seemed to have his argument prepared, but I think I can simplify it somewhat.

The COURT. I think so.

Mr. CORREA. Because the Government's feeling is, and I should state first as to counsel's last statement as to the overt acts not being proved by statements of the defendant, especially a state-
735 ment of the defendant in court on the witness stand, that is not at all clear in the cases. As far as I know, there is only one case on that, in the Philippines, and I don't think it is very good authority. But our position is, inasmuch as we have to prove only one overt act, and have, in our view, established beyond peradventure of a doubt, in a legally sufficient manner, at least three of them, that we are willing to go to the jury on those three, resolving any possible question concerning the others by asking Your Honor not to submit the other overt acts to the jury as overt acts.

Now, the three to which I refer are the first, the second, and the tenth, all three of which have, of course, been proved by the required direct testimony of two witnesses.

I do not intend to argue either of them extensively, because I do not think it is necessary.

I might point out to Your Honor with respect to the first and second overt acts, and the objection which is made, that those are acts that, in fact, what is charged in each of those acts is treating with or associating with and counseling with an enemy, and if we think of the defendant as meeting with Thiel or Thiel and Kerling in the uniforms of the Germany army, as fugitive soldiers, within our lines, it would be perfectly clear that the act was one

736 of manifest treason. Now here, there were none the less German soldiers because they were out of uniform, and the only element that their being in uniform adds to the one act is knowledge on the part of the defendant, and that we have established in this case independently by good and sufficient proof.

So we submit, if Your Honor please, that the first, second, and tenth acts are beyond question as to their legal sufficiency or the legal sufficiency of the proof offered in support of them. But as to the others, while we do not concede, naturally, that they are legally insufficient or insufficiently proved, to avoid any question we are willing to have them withdrawn from the consideration of the jury.

Withdrawal of certain overt acts

Mr. MEDINA. Do I understand definitely that the others except one, two, and ten are now and have been withdrawn?

Mr. CORREA. As overt acts; yes, sir.

Motion to overt acts one, two, and ten

Mr. MEDINA. I now as to one, two and ten, specifically make separate motions addressed to each of them so that I may protect my record, Your Honor.

The COURT. Yes. The overt act number one relates to the meeting in the Twin Oaks Inn. Number two relates to the meeting in the Twin Oaks Inn and Thompson's, 83rd Street, and

737 overt act number ten relates to the false statements.

Mr. MEDINA. Yes. I not only make the motion as to each of them separately and severally so that I may get Your Honor's ruling, but as to each one of them, and take my exception.

The COURT. Now as the record stands, the Government has withdrawn all except overt acts 1, 2, and 10.

Denial of motion as to over acts one, two, and ten

Mr. MEDINA. Yes, sir. Does Your Honor deny my motion as to one, two, and ten separately?

The COURT. Yes; Mr. Medina. I take it that the rule requiring two witnesses has been complied with there.

Mr. MEDINA. May I respectfully note an exception to the denial of each of my several motions addressed separately to those three overt acts?

The COURT. Yes, sir.

Mr. MEDINA. Thank you. I am ready to sum up at Your Honor's pleasure.

The COURT. We will take a ten-minute recess.

(Short recess.)

(The jury returned to the jury box.)

738 *Summation for defendant*

Mr. MEDINA. May it please Your Honor, Mr. Foreman and Gentlemen of the Jury: I should like, before I start here today, to express my thanks to Judge Goddard for the many courtesies that he has extended to us during this trial, and as well to pay my respects to Mr. Correa and Mr. Burke and Mr. Goodkind and Mr. Willis, and the FBI men who have helped a great deal.

I may say as to Mr. Correa, that I appreciate his fairness and his courtesy here. I have a very high opinion of him for some reasons that he knows that have nothing to do with this case. It is a pleasure to me, as I finish up here, to pay my respects to him, which I most sincerely and genuinely mean, and I want also to thank my colleagues, Mr. Minton and Mr. Jordan, who have borne far more of the burden here than I think you gentlemen may be inclined to realize.

I have a very definite notion of how I am going to sum up here today, and I want to tell you about it to begin with. I have got it carefully mapped out here, and I am going to try to be quiet about it and to take my time and to cover everything there. I did not finish working this out until about half past three o'clock this morning and in doing this I want to explain the theory that I am going on.

739 Now in the first place I want to mention certain general matters that have a very considerable bearing. And then I am going to use what I call the analogy of the telescopic focus. In other words we will look first at the broad view. You know sometimes if you have one of these little Scenic kodaks and you are taking pictures and you take a view a little distant you get a wider angle and you see certain broad outlines; and then if you take what you call a close-up the focus becomes clearer and finally almost microscopic.

Now that is the theory that I am going on here. I am going to give you those broad background outlines, and then I am going to get that focus closer and closer to the most vital parts of the case. And I tell you gentlemen with all the sincerity I can command that I intend to discuss every single part of this case. If I omit any detail it will be by sheer inadvertence. I mention that because Mr. Correa comes after me. It is easy for a lawyer who sums up first to forget some little thing, and then the man who comes last says, "Oh, he didn't mention that at all." And so, of course, that is extremely important.

I tell you gentlemen—and you know me a little better now, you have seen me here during this trial—I tell you I am
740 not consciously going to omit anything. I do not believe in trying a case by passing or evading the issues or the

points. Now if as I go along I seem to get a little excited or to raise my voice, forgive me. I know it is better not to do that, but I have my own temperament to deal with; I cannot change myself. If I do that, just bear with me. I know it is frightfully annoying when somebody is shouting and making a big noise, and I know better. Now if I do that, say it is only a moment, and don't hold it against me or against my client. I do not mean anything by it at all.

I try to see this summation as something in which you and I are sitting down together to discuss these things. You know that every word I say I will say for the advantage and benefit of Mr. Cramer. I represent him here. I do it in the greatest sense of the word that you can imagine. I make no apologies to you gentlemen for representing him. And I say with the utmost frankness that everything I am going to say here is designed to help him. I do not want you to be fooled by any of that. And so when we talk, as I say, about these things, bear in mind I know I am giving his point of view, and I am trying to do it as well as I can.

Now as to these general things I wonder how many of you gentlemen remember when you were in public school, as I was,
741 and they had the salute to the flag and those words burned themselves into your memory so you cannot ever forget them—the last words, which are "With liberty and justice for all." I never forget the days I was in school as a boy. I suppose those things form our character very largely. "Justice for all." Now that is something that we Americans take very seriously, gentlemen. It does not mean one kind of justice for the rich and one kind of justice for the poor; one kind of justice for people who were born here and another kind of justice for people who were born in Germany or in Italy or somewhere else. It means justice for all, and there never was in the world a more sacred thing, a more sacred thing than justice, gentlemen.

I tried here, as I have done my little bit in making the wheels of the administration of justice go around, to do it with a proper regard for my duty to my country and my duty to the Court and my duty to my client. It is one of the things we are supposed to do, and I want you gentlemen to start here realizing that when we say "Justice for all" we mean it. Don't have any predilection against this man because he was born in Germany. We just don't do things that way here in this country, and it does not matter how they do those things anywhere else.

Of course as part of our democratic process here I think
742 a fundamental thought is to make sure that no innocent man is ever convicted. That is why we have our presumption of innocence. That is why we have our rule, and such an

important rule, that you cannot find a verdict of guilty when there remains in the mind of a single member of the jury a reasonable doubt or any material fact. It is because here in our country the thought is that it is an abhorrent thing that an innocent man should be convicted. Now in Europe, on the Continent, it is different. There they think of the State first, they think of the opposite presumption; they think of the opposite approach. They say, Well—if once in a while an innocent man goes down we'll let him go, it is better for the public welfare as a whole. Now, we don't do that, we never have done it; we are not going to do it now, gentlemen, because we cannot and still maintain the principles that we have got here.

There is one thing that I mentioned in the beginning, and you remember these are those general observations that I told you I was going to make first. You remember how I said when I was opening to the jury that I was worried because we did not have anybody on the jury from Cramer's status in life. There is not any mechanic there among you, there is not any man who was brought up in the kind of life that he has had. I am sorry
743 about that. I would have wanted somebody to be there who could speak for him. Now I say that makes it all the more important, gentlemen, as I told you in the beginning, that you should as you deliberate take that into consideration. Realize that it is going to be hard for you to understand that man. He is different; he has had a different life, different occupations, different opportunities. And so you must be careful, you must be very careful, to try your level best to understand him.

Now you may have wondered why it was I wanted to have all men on the jury. Why was I so careful to try to get men that had either been born here in New York or brought up here in New York and been here a long time? Why, it is no secret, gentlemen. I want people who will understand me. I want men that I can talk to with some confidence, who as I interpret this man will know what I mean. I know it is not possible for you as you sat there listening to him the last few days to get his point of view. Oh, how I wish it were, but it is not. But you can do your best, and at least I think you are going to understand me. And, as I said, I make no bones about that, I make no secret of why I wanted people like you on this jury, and I am so glad we have you, men of intelligence, men of experience, men who have been around here and look at things much as I do.

744 Now what is this crime of treason? It has been said in the beginning that it is the worst crime known to our jurisprudence here. And it is. It is the foulest crime, gentlemen, that can be committed. It is not just the worst by some theoretical placing at the top of the list. It is the worst because

from start to finish, from top to bottom, it is the foulest crime that man can commit. Don't make any mistake about that. And that is why it is that we have had the multitude of injustices in treason cases in past ages. And don't forget that, there has been more injustice in the history of the world in treason trials than ever in any other. And that is why when our country was formed you find the only crime that is defined in the Constitution is the crime of treason, with this rule about the two witnesses and the other things that are in there. And in the statutes of the United States peculiar and special safeguards. Why? Because everybody who participated in that Constitutional convention knew that there lay the danger in times of crisis, in times of emotion, in times of war, when everybody was naturally excited. That is when the injustice would come. And in our country every safeguard that is reasonable has been placed so as to eliminate in so far as is humanly possible those injustices. That is why those provisions are there. And what has been the result? What
745 has been the result, to the great glory and satisfaction of our country? There have been many acquittals, many verdicts of not guilty in treason cases, whether you go back to the trial of Burr or whether you take trials during the Civil War or during the Great War. That is the test. That is the record that we have had here. It means that just because you are at war, just because there is natural public clamor and emotion, that does not mean that a jury sitting in the trial of a treason case in the United States of America are going to be guided by anything but the evidence. And so are you. And I say to you gentlemen, as I said in the beginning, I am not going to make any appeal to your emotions or to your sympathy. I told you I would not and I have not during this entire trial. But what I do say and what I do say with all the power I have got is that this man has rights; he demands those rights, he demands them of you as of right, One American citizen to another. And those rights I am going to try to show you can only be carried out and afforded to him by a verdict in his favor here in this case.

I told you in the beginning, and I tell you now, there is but one issue in this case and that is the intent. There is not any doubt that this man did the things that they accuse him of doing.

We never denied it to you in the beginning, we don't deny it
746 to you now. And remember as I go along in this summation that every word I say—and indeed I think you will bear me out that everything I have done during this whole trial—is direct toward one objective—to convince you that this man Cramer did not have any traitorous intent. That is all I am going to be talking about here, gentlemen. I may seem to be digressing, but everything I say will come back to that.

Now I told you that I would have first a wide focus of background. Let me take that up separately. The first thing I have here is Cramer's standards of right and wrong. Nobody can deny that when you are dealing with a man's intent to commit a crime, and particularly so great a crime as this, his standards of right and wrong play a part. Perhaps not so great a part as some other things, but they are in the picture, aren't they?

Now what does the evidence show us about that? Well, first there is his religion. And I want to have you men realize that if Cramer lied in any particular on any point, have you any doubt that the FBI, with all the power of the government, would not have discovered that lie? If, for example, when he said that as an American citizen he voted every election day since he was
747 naturalized as a citizen, do you suppose he could have got away with that if the fact were otherwise? Don't you gentlemen know perfectly well that every detail that he testified to would naturally and immediately be checked?

I say his testimony was that he was brought up in the Catholic religion as a child, and that he practised that religion through the years, and that he does today. Now I don't say that because he is a Catholic. If he were an Episcopalian, as I am, it would be the same. I don't emphasize the denomination. I say the man has had religious training and that he has adhered to that. Not just as a boy, but over the years. It adds a little, doesn't it? Perhaps not much, but surely you cannot disregard that.

Now next, he has an utterly unblemished record. In all these years since 1925 that he has been here in the United States he has never even been arrested, he has never been accused of any crime, as far as this record shows. He has never done anything wrong. Now the man is no child. He is now 42 years of age. Can a man reach that age and be absolutely devoid of any wrongdoing without that being a circumstance that you gentlemen should consider? Am I fair about it? Is it reasonable when I ask you to take it into consideration?

What is the third thing in there? All of these employments that he was in. I know just how carefully you
748 watched him when he testified as to those. But he was never discharged once for cause. And, of what a pitiful thing it was, when you come to think of him going from one job to another and hardly ever out of employment, taking any kind of job that came along, and dozens and dozens of them. And over all those years never discharged for cause, never insolent, never incompetent, never doing anything that was thought by any of his employers sufficient to dismiss him. Now, gentlemen, as I said, is that a little something in his favor, or am I wrong about it? I am talking now about his standards of right and wrong.

A man cannot go through a whole long life and then do something where his intent alone is at issue and then have men in a jury box disregard entirely the whole first part of his life. You cannot do that. And it has a legitimate theory. It has something to do with it. It is not conclusive, perhaps it is slight, but it is there.

Now I come to my second part of this broad focus. I call this the personal life of Cramer, what kind of a man he was and what he did. First as to his work. I am not going over all of those different employments. You gentlemen, as I said, noticed it. I noticed how you were watching him very closely when he testified to that. He did about every kind of honest work a man could do—every kind he could do. And then what was the culmination of it? I mention this because, of course, it is going to be contended here that he is frightfully smart: and oh, he is just the most cunning, smart fellow you ever heard of. Well, what was the result of all these different employments, all those things he did? What was the culmination? Well, he wound up after all those years of work finally having a job that he thought was fine, getting $45 a week over there in the Licorice Company, working down there in that boiler room. He did not look much further than that. That is the kind of thing he had been looking forward to. All these years up in his room studying those books. And let me tell you, gentlemen, I don't know how it ever occurred to you about a person's education, and we Americans don't realize how lucky we are. Here was this man. He told you what happened. He went to what was the equivalent of grammar school, and then they put him off in a forestry school, and he got out of that at 17. Just think of the difference when you come to what we get here, the kind of education that develops us, broadens us out, teaches us something. He did not get anything like that. He has not had the experience or anything that would develop the judgment that you gentlemen and I have.

You know, I have had a lot of experience in the courts. It is hard for you gentlemen to realize it. I am just as much at home here, perhaps more so, than I am when I am up there sitting in my apartment reading a book. It is my life; it is the kind of thing I do. And I have seen a lot of tragic things, and as I do I think of myself and I think of the chances I had. I think of the luck that I have had, and when I see some man in trouble I often say to myself, "But for the grace of God, there would be Harold Medina today." I don't fool myself, gentlemen, that is the truth, and I do not doubt that you thought the same way. We cannot change people's background.

And so with Cramer. He had all these jobs, he had this partial education, and he came here and he tried so hard to improve himself. And with his English. I did not actually get that little

book out that he had in his pocket. You heard him testify about it, that when they arrested him he had this pamphlet "How to Improve your English." The thing was practically worn out from his thumbing over it, studying over it, marking it and checking it. And yet his command of English is not nearly as good as he would like to have it. Of course he tried his best: he has tried to improve it a lot. He tried to improve himself all that he could, not by taking courses as you and I would do. We know where to do that; we have the money to do that. What did Cramer do?

He was there in his room by himself night after night.
751 You heard what he said about taking an examination for stationary engineer. He got the certificate out in Indiana, and then when he got here to New York he had to do it all over again because they would not recognize the certificate that he got out there. These officials don't think always in terms of human material. It did not matter to the board here what it would mean to a fellow like Cramer to take the examination over here.

So for five long years—I don't know whether you gentlemen realize what five long years would be—sitting up there in his room with his books, such books as he could get, studying and marking and pondering and trying to get to the point where he could pass that examination. And he did. He did.

Well, there we are. I suppose life has not dealt particularly kindly with Anthony Cramer. Nor has life dealt very harshly with him. He is just like thousands and thousands of other people, gentlemen. Particularly those who come here from other countries. Just exactly like thousands of others.

Now we will come to this question about his being so smart. Well, as I understand it there are two kinds of smartness. A man can have a natural intelligence, and you find those persons are good students and they are good businessmen and they
752 get along. Then there is another kind that I call animal cunning. Some people have not got the intelligence that I first spoke of, but they have a kind of animal cunning, they have a kind of shrewdness.

I say to you gentlemen, is there anything that you can find in Anthony Cramer's life to show that he has either one or the other of those? I know it is going to be contended here that as he was on the witness stand and was questioned every time he said he could not remember what was in the statement or could not recall—that is going to be explained to you that he is just slick, he knows how to do that, he is so smart, he is just two jumps ahead of the others. If you think this man Cramer can be two jumps or any kind of a jump ahead of a man like Mr. Correa, I just don't see how you can think it. Look at his life, what he has done and what he has been. If he was so smart and cunning he would

have stolen or have done some wrong, gotten into some kind of trouble. If he was so intelligent he would be like some of the people that he mentioned in his letters, who had the big farms and the factories, that so and so is on his way to become a millionaire, a big farmer. But Cramer did not have anything. If he is so smart why is that?

Gentlemen, I do not say he is a fool. I do not say he is stupid. I do not say any such thing as that. What I really mean
753 to say is this: The man has not had the education, he has not had the experience that would give him the kind of thing you and I call judgment. He just has not got that, has not had the chance to get it. I do not say he is a fool and knows nothing or hasn't got any sense. Not at all. I say he has not had the background, the education and experience that would give him any judgment. How could anybody like you gentlemen or myself have anybody, a friend of ours or not, come to us with a money belt with a lot of money in it and we take it around and put it in the safe deposit box? We have too much judgment, we have too much sense, and we have had too much experience; we would know there was something wrong about it and that it would get us into some kind of trouble. But I say this man is different. He has not had that experience. That is why I have been emphasizing so that you try to understand him. You are not mechanics. You have not led his life. Do try to understand that, so you may see it would not be fair to test him by your own standards or by my standards. It would not be fair, gentlemen; you cannot do it. You cannot do that. You have got to judge him by himself.

Another thing, and I am still on Cramer as a man, and that is the second part of my broad focus here. You will see I am going
754 to keep my eye on the ball in my summation, just as I have through this whole trial. I have not asked an irrelevant question, gentlemen, nor have I objected to anything that was not matter that I thought raised some proper question of law. I do not do things that way, and I won't as I sum up to you here.

Now you remember the statement by Cramer. He said he had always been a pacifist. I will take that letter that led to the questions that Mr. Correa was asking him. Now this is the one that he wrote. It is Exhibit 63, that he wrote on April 21, 1942, after we were at war with Germany, to this man Thielmann, who was the fellow that had gypped him in the delicatessen store deal that he explained to you. He wrote this letter to Thielmann chiefly to get some money from Thielmann. There is not any doubt that Thielmann owed him the money.

755 . There is not any doubt that Thielmann owed him that money, and you remember he testified that when he went to the Corn Exchange Bank that morning he deposited money there in his account for $10 that he had received from Thielmann. This is the same Thielmann out in Chicago.

Now the first part of this letter, the general point about it, as I read it, and I am going to read you the exact words, and not characterize it, but as I read it Cramer is in effect saying "My goodness, think of all of the people of our age getting put in the American Army. Here we are old men, as it were, and think of the chances that we are going to get drafted and go in the Army and have all the hardships and all the trouble that would come from that." That is what I think that meant to say to Thielmann. I don't really know why he should not.

Now let me read you the translation, and before I do it let me get the matter of these translations out of the way. Mr. Correa was trying awfully hard to get points of issue between him and Cramer; to get Cramer to deny something so that he could say, "ah, Cramer is doing some more lying," and he fooled around with the translations to try to get Cramer to say some of the translation was wrong. There were two or three little places where he almost succeeded, and then when the thing was analyzed, as you gentlemen remember, it all came down to the
756 same thing; the difference was merely one of phraseology; it was not a matter of any importance at all, and you know how from the very beginning of this case I have admitted that the translations were correct, and I said to you not only I think in the opening, but certainly later in the trial, and I did it on purpose, that I had taken up these translations with Cramer and that he had told me they were substantially correct. And he did. There is not any dispute about those translations. Don't be fooled by that. There is nothing in that at all. Of course you can take any kind of foreign language and translate the words in isolated instances a little bit differently one way or another. But there is no point about that. I have never taken the position here, and I don't think that Cramer meant at any time on the witness stand to really claim, that these translations were wrong translations. He had one or two little interpretations that were slightly different, and when you followed the examination along, they just did not wind up anywhere.

Now here is what he said: "It has been a long time since I have heard anything from you and I am curious to know how matters are really going along with you and what good things
you are doing. Are you still involved in this new draft
757 story or are you past the age for military service? It is not at all out of the question that one of us will have to

become a soldier again. Personally I should not care at all to be misused by the American Army as a world conqueror. Who would have thought it at all possible a year ago that we of our mature age could again be made subject to conscription, and after one has spent almost half a lifetime here in the States. Yes, that is the way that the world changes, and mankind seems to get crazier and crazier."

Now what is there disloyal about that? What is there wrong about it? When you take those paragraphs as a whole, isn't it plain that what Cramer is saying is that it looks as though maybe he would be drafted and put in the America Army, and he did not like the idea at all, and he testified here that he had been a pacifist all his life.

You looked at him. Did he look like a military-minded person to you? When he says that he did not like war and he did not like the idea of going into the army at his age, did it seem sincere and sensible? If he says he was a pacifist, why not, gentlemen? Why not, gentlemen? What has there been in the life of Anthony Cramer to make him think that war was a glorious adventure for him? What is there in his life that would lead him to be other than a pacifist? I say it with all
758 frankness. Why should not a man with his background, a man as he is, have written exactly that, and without the slightest disloyalty to the United States in doing it? Do you gentlemen suppose that if you look into the minds of thousands and thousands of Americans, good Americans, patriotic Americans, who were 43 and 44 years old and who were in the draft, if you looked into their minds, don't you think there would be some of them who would be thinking just about the way Cramer says he thought? I don't think anyone need be ashamed of that. Of course no one knows our secret thoughts. Those things we keep to ourselves. We know them. We must judge other people by those things.

Now such, I say, was Cramer; a humble man; a humble man; a man with a life that has not got a single blemish in it; nothing wrong; no accomplishment; never did anything; and he never hurt anybody.

So much for that second part of that focus. The third one that I have here, and I think you gentlemen must realize that these things as I have arranged them are singularly relevant and proper to the issue—the third one I have here has to do with his veracity. Did he tell the truth? Did you believe him?

I am not going to do a lot of argument on that because
759 your gentlemen have been watching him here; you have been listening to him. You are going to, when you get out there

in your jury room, talk about those things. You are going to exchange views as to whether this that he said or that that he said was true; was he telling the truth; was he trying to evade? No argument by me can have much to do with that. You gentlemen will decide that yourselves by an exchange of views, as you should.

But there are some things that I think I ought to talk about. Now he undoubtedly lied first when he went down there to the FBI and told them that this fellow's name was Bill Thomas; told them that he had been out there on the West Coast and he had not been out of the country. You remember all of that. And Cramer says that he did that to protect Thiel. Thiel was his friend. Now, how can any of you gentlemen doubt that Thiel was his friend? I don't believe there is a man in this jury box that has the slightest doubt about that. So when he said that he told those lies in the beginning in order to protect Thiel, isn't it reasonable, isn't it probable that he should do that, and he gave as the reason that he thought that Thiel might be mixed up in this draft business, not some general draft business, but because he had failed to register for the draft. And as I said here this
760 morning, whatever he may have put in that statement there, there is no dispute that that evening, later on, he explained to Mr. Willis, whether it got in the statement or not is not the question—Mr. Willis told you gentlemen that that evening later on Cramer had told him that yes, he had lied at first and that he lied because he did it to protect Thiel. Now that is what he said. I don't know. It sounds reasonable to me, but it is for you to decide. You are going to say whether you think that sounds reasonable or not.

You remember what happened after that. He talked for a while telling him these things that were not true, and then Mr. Ostholthoff said to him, he said "Cramer, I don't think you realize what a jam you are in." And I don't think he did. I don't think it ever entered his mind, and when Ostholthoff mentioned that to him he did what I think any man would do who had been trying to protect his friend, he said to himself, "Well, here I guess I better not do this." So he said "Let me talk to Mr. Ostholthoff alone." And the result of that was the rest of them went out and Mr. Ostholthoff remained, and then he explained to him that really this fellow, Bill Thomas, was Werner Thiel, and that he had not been out on the West Coast at all, but that he had gone back to Germany, and all that. And you remember how Cramer said
761 that Ostholthoff promised him that he would not mention the fact that he had lied at first.

Ostholthoff was not recalled in rebuttal to deny that he made that promise. I don't suppose you can blame him an awful

lot, but it is a little sour note, isn't it? He promised him. They do not deny that they promised him that if he changed his story and told them that really it was Thiel and really he had gone back to Germany, that they would not mention it. But they did mention it.

Now Cramer, of course, thought they were going to keep the promise. He thought "Well, after all, I did lie, but now I can tell them what the fact is, and what I said at first will be forgotten; it will be lost in the shuffle." How many men, gentlemen of the jury, do you suppose have been questioned by the police and questioned by the FBI who did exactly that same thing? How many thousands of people do you suppose when they first come, do not realize? It may be some of them want to protect a friend; how often it must happen that they tell things at first that really are not so and then, when they begin to realize that after all it is more serious than they suspected and they may be involved in some way themselves, they say "All right, I will come through and tell you." All right. There it is. It is for you gentlemen to decide.

762 There is another thing that has been mentioned here and a great deal made of it this morning and yesterday, little things that Cramer said when he was on the direct examination, and when I say little things, they may be more or less important as you consider them separately. I do not mean to try to pooh-pooh them or get them out of the way, but there were a number of things, such as that matter of the remark that he said on his direct examination; that when he talked with Thiel there and they were talking about this draft board business and his not registering, and his having this name of William Thomas, that he produced this draft card with "William Thomas" on it.

Now there were several of those things, gentlemen, that he did not mention when the men of the FBI were questioning him, and that he did mention when he testified here today.

Let me put this thought in your minds: as I said, I have been through a great many trials, and there is one thing I have never known to fail and that is a party, an interested person, the kind of person you would say from the very beginning would think the whole thing out and drag out of his recollection every shred of memory that was there, and yet every case I have ever been in, as the man sits there during the trial, or the woman sits

763 there during the trial, and their mind works, their recollection is refreshed. More things honestly do come back to them.

I remember a little phrase in De Quincey, that English opium eater book of his is one of my favorites, it is such a light and such a profound book, but there is one little thing he had in there where

he said that things that happen fall upon our memory as softly as light, and so that memory is all that accumulation of impressions made as softly as light; every detail, everything that ever happened to us, every word we ever heard, every impression, every sunset we ever saw, gentlemen, everything that happened to us, is there, every detail. Make no mistake. But when it comes to bringing it back, no one knows what it is that will stimulate the memory as to this, that, or as to the other. Sometimes you remember more, sometimes less. Now you gentlemen know that is so. You know that is so. The question is, was this man Cramer putting on an act, there? Was he faking? Was he making out this?

When I come around a little later on to the closer focus, I think you are going to see that there was no deliberate concealment by this man of anything. No one in such a predicament as this man stands today ever told the Government so much; ever helped
764 so much; ever identified so much and so completely. No, gentlemen, when he remembered a little more here and a little more there, it is fair for me to argue that he really did, and that his recollection was, as he said, refreshed. He thought of more. He could not always express himself as he wanted to.

I thought, as I sat there listening to Mr. Correa when he was questioning him, "Was this in there?", "Did you say this?" "Did you add this?" there were certain limitations of expression that made it hard for him. But you gentlemen took all those things into consideration. So I leave that. I really think when you come to go into the jury room that you are going to say that you thought Cramer told the truth. Surely there is much ground for my urging you to do that.

Now the fourth thing, by way of this general background, is the background of fact and circumstance. You remember I have taken up three now. Now I am into a general background of fact or circumstance.

In the first place, you heard a lot about the spy system. You heard a lot about these saboteurs over in Germany, how they were training and got their experience, and all that. Well, there has not been a scintilla of testimony in this case, gentlemen, to connect Cramer with any of that; not one word to show
765 that he knew; not a breath of a word to show that he had any idea that Kerling and Thiel and those other men were going to that school of saboteurs over there in Germany to learn how to blow up this and learn how to blow up that. That is in the case, but it has nothing to do with your deliberations as to Cramer's intent, because there is no evidence to show that he knew; absolutely none, gentlemen.

Now, how about that box that he opened? May I have that

brown envelope and also that card from the safe deposit people [same handed to counsel].

Of course I realize that the thought might have passed through some of your minds, maybe Cramer got this safe deposit box when he got it because he thought that some day he would have occasion to put some money in for some spies. I say to you gentlemen you have no right to think that. There is no evidence to justify it at all. The proof is uncontradicted. What is it? The proof is that this man bought some stocks worth $400 or $500. He bought them in June 1941. You do not have to go by his word because we have the concession from Mr. Correa. You remember that, too, and here is the little stamp on this envelope from the brokerage house of Steiner, Rouse & Company, 25 Broad Street, New York, "Registered mail" addressed to Cramer, and that had those stocks in it, $400 or $500 worth of stocks.

766 Well, he naturally wanted a place to put those, and so he went around to the Corn Exchange Bank on July 3, 1941, which is the very day that he got those, because you will notice it says "Second notice, July 3, 1941," indicating that when they went to deliver it to him the first day, which was June 30th, he was not there, and so the actual delivery was on July 3rd, and on that same day of July 3rd you will find these cards here from the Corn Exchange Bank to show that he went around and rented the safe deposit box. It says $5.00 on here, but he paid $6.00 and the extra dollar was for the key or keys, and Mr. Correa has agreed and has stipulated that he bought those stocks and that later, before these events happened in June of 1942, he sold those stocks that were worth some $400 or $500, and the money was spent for some reasons that had nothing to do with the case. I do not say that Mr. Correa conceded for what purpose the moneys were spent, but he did concede they were bought, and bought from Steiner, Rouse & Company, and sold by Steiner, Rouse & Company, so I would not have to call these people.

Now that is how he had the safe deposit b . . . There is no mystery about it; there is nothing to warrant you in drawing any different inference from that.

That means, and I think it is awfully important, that this
767 case starts, as to Anthony Cramer, on June 22, 1942. There is nothing before then, and when I go over these various elements that I have been going over, I have been doing it on purpose because I want to narrow down that focus as I have been telling you.

This safe deposit box, these various things that might have happened before then, there is no evidence he knows about it.

Now, gentlemen, there is one of the most dangerous things that can happen in any trial, and that is to have the jurors say to

themselves, "Oh, well, maybe there is more than meets the naked eye; maybe this and maybe that." Now I am here to defend this man and I tell you gentlemen, and you know it to be true, that you swore when you entered this jurybox that you would decide this case on the evidence. Those were your oaths: not to decide it by speculation, not to decide it by some sort of surmise or influence, but to decide it on the evidence. You cannot do otherwise, gentlemen. It is your sworn duty and you must, and it is important.

Now, for example, because I do not believe ever in dodging anything, you have seen enough of me for that, you take this business I brought out on Cramer's direct examination about the Navy Yard: that he made an application to the Navy Yard
768 for a job as shipwright, because he did. He thought he could earn more money than that, and he decided after all that involved woodwork and he made some change as to a flange turner, which was work he had had some experience with. He said that was in August 1941, and nothing came of it, and he never worked there and never actually went there. Now, gentlemen, if there is anything in that point the Government would have let you hear plenty about it. I don't think you have any right to sit there and speculate and think, maybe this or maybe that. The evidence is just what I tell you there, and, as I said, if there was any more to it than that the proof was readily available to the Government.

The next thing I come to, and you see how my focus is always becoming more important—I am narrowing it down for you, I am trying to use all the art and all the skill that I am capable of to bring this before you in a way that will be most forcible and at the same time most helpful—the next one I have has to do with this motive that they claim. That is also a matter of background, isn't it? They say he was disloyal to the United States. Now let me be very specific. I want to show you just what Mr. Correa claims about this, so that we will know exactly what we are talking about.

On page 217 he defined it. He said that they were going
769 to claim that the motive consisted of a deep-seated feeling of greater allegiance to Germany in this war than to the United States, and, indeed, he adds, a strong antipathy to the position of the United States in this war.

Now I say that is not so. I say no such motive was established at all, and the evidence that I am now about to review has a bearing upon that specific thing, and of course we are still talking intent, and we are still dealing with the operation of Cramer's mind. Very well.

The first in chronological order I suppose is Cramer's connection with the Friends of New Germany out there in Hammond, Indiana. He said, and there is no evidence to the contrary, and you are not permitted to supply any evidence by imagination, don't forget that, and that I demand of you as his right on your oaths, and if I say that again and again, it is because it is so important that I insist upon it—the proof is that in 1934 and 1935, for one year, Cramer and Thiel were both members of that Friends of New Germany out there in Hammond. Factory workers were members of it; it was a recreational sort of thing. He had to be around with some people that he could talk with. After all, he was a stranger to Hammond, Indiana, as indeed he was a stranger in most places that he went, and so he says he
770 joined that for that reason.

You remember in this little statement of his that he added, he says, that Mr. Willis asked him to add this—I don't think it makes a bit of difference whether Mr. Willis asked him to add it or whether he thought of adding it himself, but he did add, in his own handwriting, just a little sentence that I think I can find—yes, here it is; he says, "I belonged to the Friends of New Germany 1934 to 1935, leaving because I did not like their marching and radical practices." Then you remember when he was being examined by Mr. Correa, he said something about some swindle that had been out there. And Mr. Correa said "Didn't you leave these Friends of New Germany because of the swindle instead of this other part." "No," he said, "I think I left it for the reason that I said." And Mr. Correa said, "But you did not mention anything about that swindle in this statement here." "Well," he said, "that is right, I did not. I did not think of it." Now is there anything in that as an indication of a lack of veracity? What is there about that that has any other significance than I indicated a moment ago, that a man thinks of more things naturally? He admitted here that he was a member of those Friends of New Germany in 1934 and 1935, and that he left, and
771 he said he left because he did not like their marching and radical practices. All right. Does that show any disloyalty? Are you gentlemen incapable of projecting your minds back to a time when nobody was thinking of any war? Is there any pretense that in 1934 and 1935 you and I and people around this country thought that war was imminent and war was coming, and matters of loyalty and all that were bruited around as they have been since? I tell you gentlemen if you are fair to yourselves you must admit that is not so. And the fact is undisputed that in the interval Cramer was not a member of any of these Bunds or Nazi organizations at all.

Isn't that important? Isn't that a matter of significance? Suppose it be argued by Mr. Correa that of course, Cramer was too slick; he would not be a member of any of the Bunds because he would know that it was smarter to stay in the background and be aside. Do you believe any such thing as that? Do you believe that Cramer is the master spy, the man in the background pressing the buttons and pulling the strings? Isn't that ridiculous? Can there be the slightest basis for any such claim as that? Gentlemen, I do not see it in the evidence. I say the fair and the reasonable and the probable thing is that if he left that Friends of New Germany back there in 1935 and since that time was not a member of any of those Bunds or German organizations, I say to you

771-A that is in his favor. That is something you must consider as a circumstance favorable to him. I do not see how people can differ about that. Anyway, that is the fact about the matter of the Friends of New Germany.

772 The next thing I want to urge is that if he had been disloyal, as Mr. Correa claims, it is perfectly evident that he is a man given to talk. In all the cases I ever had in my life I never had a man that talked so much with the police or with the detectives or the FBI as Cramer—never. He certainly is not a man given to silence and to withholding things. And I say to you gentlemen if he was so disloyal why is it the government has not produced here people who heard him say disloyal things? Surely not because they had no power of investigation and search. Why, the job they did on these saboteurs is one of the most marvelous pieces of detective work that our country has ever seen, and something that we are everlastingly grateful for. Those men know their jobs, and if Cramer had made disloyal utterances, if he had said things against the United States, why you would have seen a parade of witnesses in here testifying to it. But they did not come, they don't exist. All they produced—and I objected to it, and I tell you gentlemen and say now it has no significance—all they produced was the man who went around, this man Powers, selling some stamps and bonds, and he would not buy any. And, as Powers says, he knocked again on the door, and he opened it and

773 Cramer shut the door. The expression "slamming the door" did not come from Powers, it came from Cramer himself when he was testifying on the witness stand. Of course you can characterize about that. He was not chiseling or putting it down to help himself.

I say to you gentlemen is it right as evidence of disloyalty that it be shown when a man comes around to sell war bonds or war stamps and you do not buy them that is evidence of disloyalty? Do you gentlemen realize the number of reasons a person might have for not buying them? for not buying more? There is no evidence

in this case that Cramer had not bought some war bonds or war stamps in accordance with his means before that man came there. There is nothing but the bare statement that the man asked him and he said he would not buy even a 10 cent stamp. I say is that going to be evidence of disloyalty here? Have we come to that? Have you gentlemen come to the belief that man because of that is disloyal? Think of it. Don't let yourself be carried along by emotion. You remember how I told you in the beginning of this case and how I have stuck to it ever since that we do not want any emotion, we do not want sentiment; we want our rights, and we want you to decide the case on the evidence. I do not care what may be true in other civil or criminal cases where people appeal to the emotions and prejudices of the jury. That is not what we want to do. We want to appeal to your sense of justice, to
774 your sense of right, to your sense of what the evidence shows. That is the kind of talk I think it is proper to be put forth in any court of justice. Now let me pass on. We are still talking motive and the claim of disloyalty. Let me take out those letters that he wrote, one to Thiel and one to his family. It was claimed that they showed some kind of disloyalty.

Now I know I am taking a long time, but I know you gentlemen don't mind my doing it, and I am going to do my job right up to the end and I am not going to leave out a thing. If it takes a little time it is worth it.

These two letters here, one of them is to Thiel and one of them is to his family. I am not going to read them all, because you have had them read a couple of times. I am going to comment on them, and I am not going to duck anything that is in there at all. But I want to make an observation or two. You notice that these are both addressed to Germany. You notice they both went through what has been said to be the British censor. They never were delivered to Germany because they came back. It says "Returned to Sender—Service Suspended." So they never got to Germany and when they came back they went to that little metal box that Cramer had, and the man who had the mail boxes communicated
775 to the FBI and the FBI went up and got the letters and they brought them down, and in their presence Cramer opened the letters and gave them to the FBI men. These are the letters.

Now, preliminarily, let me ask you a rhetorical question or two. I think we all have a pretty good idea about what goes on in Germany. You do not have to have much happen over there for somebody to get yanked into a concentration camp, and you don't need very much there to have a lot worse things happen to you. Isn't it perfectly obvious that Cramer must have known that if he put anything in those letters that might bring the authorities

down on his family or on his friend Thiel, that it would go badly with them? Isn't it natural that this phraseology that they speak of as unfriendly, or whatever phrase you may use—isn't it at least clear that the way Cramer would phrase these letters when he was sending them over to Germany was in such a way that when the German censor opened them they would not send a squad of soldiers around to his family or to his friend Thiel and punish them in some way? Isn't that a fair thing for you gentlemen to have in mind? I think it is. I think it is just a little circumstance.

Now we get down to the things themselves. Most of the letters have to do with personal matters, and you remember as to this one to Thiel it was in response to a postal card.

775-A The COURT. Mr. Medina, may I interrupt you a minute. It is 1 o'clock and the grand jury are coming down at 5 minutes past.

Mr. MEDINA. Very well.

The COURT. If you have come to a good stopping point.

Mr. MEDINA. I would just as lief stop here, Your Honor; it is all right, and I will go on from here.

(Recess to 2 p. m.)

776 AFTERNOON SESSION

Mr. MEDINA. Shall I proceed, Your Honor?

The COURT. Yes, Mr. Medina.

SUMMATION FOR DEFENDANT RESUMED

Mr. MEDINA. Now I think I had got down to these two letters that Mr. Cramer had written, one to Thiel and one to his family, and I am going to read from portions of those letters, as I have them in my little book here, because I did not want to put any marks on the original letters, and it is hard when you have several pages to find just the places you want to read. But what I am reading from here is an exact copy of the translations which are in evidence. You remember that as to that one to Thiel it is in response to a long postal card from Thiel, and I emphasize the words "postal card" because a postal card comes through the mail and anybody can see it and anybody can read what is in it.

In that postal card from Thiel which thus arrived in the mail he said, "By the way, how are conditions in New York at the present time, and what are our friends doing, also those in the Middle West." When Cramer wrote this first letter I am assuming that you gentlemen will recall that a good deal of the letter refers to personal matters. I am only going to read and

777 I call your attention to the facts that are in there that the Government relies on. I am not going to take your time reading the whole letter; I am going to assume that you have in mind that these parts that I pick out are in there with other parts that one would naturally find in a letter about personal things. Now I will read these things that the Government claims are bad, and I will read them all, and then I will comment on them after I get through. He says here, referring to this man Philip Mebus:

"He wanted to give me a job and guaranteed me $100 a week, but I declined, as I don't want to dirty my fingers with war materials."

You remember that. Now over on the next page he says:

"Now a little survey from the political weather observatory over here. You will understand that I can toss you only a small crumb from this potter field, since this letter will probably go twice through enemy censorship."

Then he goes on, and you remember how he gets talking about Senator Pepper, and he says:

"The loudest shouter of all the babbling confused ducks is Senator Pepper. He has been given the name of Two-Gun Pepper. Yesterday he permitted himself the following classic quotation with reference to the diplomatic negotiations with Japan."

778 And then he quotes: "'There is a white line somewhere in the Pacific, I don't know exactly where it is, neither does President Roosevelt, but as soon as Japan crosses this line we start shooting at her.' So amazing and childish that one could be highly amused by it if the results were not so tragic. Look, now there are the Japanese emissaries in Washington trying to come to an understanding, they are sitting earnestly in negotiation chambers, while Two-Gun Pepper shouts insults in through the window."

You remember Mr. Correa reading and referring to that. Now he refers again to the contents of a book, and there is no proof here that these things were not in that book. So we get over to the final part of this letter; and I am trying, as I said, gentlemen, sincerely to give you the worst parts. No use fooling myself about this, of course that is the part you are interested in, and I am giving it to you. Now he goes on:

"But words are of little value. Not vocabulary but defiance, boldness, will, and sharp weapons will decide the war, and the German army and the German people are not lacking in these. We sit here in pitiable comfort when we should be in the battle.

"As Nietsche says, 'I want the man, I want the woman, the

779 one fit for war, the other fit for bearing.'"

Now that letter is November 25, 1941. Then there is another one dated December 3 to his family, and I want to read you

the parts of that that may be considered as establishing some motive for disloyalty here, because that is what we are talking about at the moment. Now in that letter to Cramer's family over in Germany, among other things, he says:

"But now, like Robinson Crusoe on his island, I am in America and must wait until German ships come to this shore again as messengers of peace. Well, let us hope that it will be soon."

And then he goes on and says:

"I see what a desire for annihilation with respect to Germany is sprouting and growing. Today a lost war has lost its meaning for Germany. It means today a complete extirpation of the German nation."

Now I have already mentioned to you the fact that these letters were to be received by people in Germany. His family and his friend Thiel. He naturally did not want any harm to come to them. A slight point, but one that is not to be lightly disregarded.

Now let me add to that. This was before the United
780 States was at war. Is a man of a certain race not entitled to maintain his loyalty to his own country, America, and still have some feeling for the country where he was born and his family who live there and his friends? Is that really, gentlemen, a disloyal thing? Does that honestly establish, as Mr. Correa claims, a deep-rooted antipathy to the United States? Because in writing to his family—and it was a Christmas greeting letter that he was writing, too, and he naturally wanted to bring some word of good cheer and encouragement to them; even though he was poor and humble he would still want to do that—what is there so bad about his saying that he felt like Robinson Crusoe on his island, when he was away from his homeland so that he could not get back to visit them any more? Does that seem reason to be disloyal? I want you to think about that. I do not want to exaggerate it. I do not want to put the thing too strongly. But I say think about that.

Now let me read you the words of a great judge of this court in a treason case that came up during the last war, because it says exactly what I want to say to you gentlemen about these letters. He says:

"Prior to April 6, 1917"—and that was the day the United States declared war, at the time of the first world war—"Prior to
781 April 6, 1917, a man may have been pro-Ally in act or in sympathy, or he might have been pro-German in act or sympathy, and he was within his rights. However we may, as individuals have differed with one view or another in connection with pro-Ally sympathy or pro-German sympathy, any man

could have engaged in any legitimate propaganda or any other legitimate act."

That was Judge Mayer who wrote this opinion.

Now, gentlemen, I tell you it is the law this man had a right to write these letters. The sentiments that are in those letters, however much you or I may disagree with him, were his right to do.

Now let me leave that, because, of course, that is important for your consideration but let me leave it and touch a slightly different thing. Do you remember the days before Pearl Harbor? I do. I think there are many, many Americans today that are ashamed of what they thought and what they said then. You take this part I read to you about Two-Gun Pepper and the insults thrown at the Japanese whose emissaries were supposed to be negotiating for peace. Do you not believe, gentlemen, that there were thousands of perfectly good American citizens at that time who thought the very selfsame thing? Now be fair. Am I making this up? Is it something that is not so? Or is it

782 something that from your own experience, looking back to those times, you know to be mistakenly so. People now that thought those things and said those things wish they never had. When those Japs made that treacherous attack on Pearl Harbor on December 7th of course things were changed, and if they changed for others why is it so improbable that they have changed for Cramer, too?

Now let me say another thing. I have referred to sentiments such as he has in these letters that doubtless many thousands of perfectly loyal American citizens said. People who were born here, people who had lived here all their lives, people who never had the slightest reason of any kind, race or otherwise, to think about anybody else who said those things. Many prominent people, many people in the halls of Congress and in the public press. Do you believe, gentlemen, that there is one law for the rich and powerful and another law for the poor and humble who may not be able to defend themselves as well or to explain as well when they are questioned? Is there such a difference? I do not think any of you believes there is. And of course the law recognizes no such difference. If it was all right for some prominent man in Congress or some prominent editor or some person in the public press to come out and say those things, it was just as much the right of the humble mechanic Anthony Cramer to do the same. I say those things prove no more disloyalty no more deep-seated feeling against the United States, than

783 the man in the moon has.

Now let me go on to another thing. You remember when I moved for a mistrial here yesterday. They had asked Cramer

about the contents of a letter he had received from one of his relatives in Europe. I did not think that the Government had any right to do that. Well, the judge disagreed with me. I do not criticize that now. So Cramer went on. Not what he wrote, mind you, but what somebody else in Germany wrote to him. What that is supposed to have to do with this case it is a little hard for me to figure, but here is what he said was in the letter. They did not, as I see it, quite have the nerve to bring the letter out. They have got it, but they did not bring that out, because it is inadmissible, and its admissibility would, I think, have been all too manifest. They did it by asking Cramer if he did not get a letter, and what was in it. So he said, after I had objected and tried to keep it out for the reason that I explained to you, "Yes, I got it," and the letter was from his brother, and his brother had said that his father said some of Cramer's letters had things in them which were unfriendly to the United States and he thought he better look out, he might be put on the blacklist.

Of course, gentlemen, you know the difference between the way those things look in Germany and the way those things look
784 here. Is it so curious that Cramer should tell you, as he did, that he thought this was a free country? He thought he had a right to say these things. I proved to you by an opinion of the court that he did have the right. But he says he thought he did. This was a free country, people would say those things here. But of course in Germany it looked different to his father and it looked different to his brother, and when his brother wrote to him that he better look out, that those things might put him on the blacklist, that is because that is the way they looked from the German standpoint.

Gentlemen, does that seem reasonable, the way I am putting it to you? Does it seem that I am stretching it or exaggerating it? Because I do not want to do that and I want to meet everything, every one of these things, frankly and candidly. But I do tell you it seems to me that it might have looked and almost certainly would have looked very different from the standpoint of Cramer writing here than it did to his family, subject to all the oppression and coercion that Germans have been subject to.

Now there is another thing. I would like to have those signs manifests. I do not want to take the time to go over all these, but I do want in conclusion on this issue of loyalty to point out two or three things that are matters of documentary proof. I do not deny that when a man is fighting for his life, as
785 Cramer is here, it is hard to get everything exactly accurate. It is not easy even if you are a smart businessman and a successful person who has had lots of experience talking and arguing, discussing and answering questions. It is even hard

then for such a man fighting for his life to keep his poise and to understand and answer everything the way he would want to. I say you have to take that into consideration a little bit, and so I emphasize what the documents show.

Here is Cramer came over here in 1925. He came because, as he said, conditions in Germany were terrible. The food was very little, conditions were such that there was no opportunity for anybody; inflation was then going on, and he came here because he thought he could earn an honest living here. Now certainly Mr. Correa cannot claim that when that boy left Germany in 1925 he was part of any spy arrangement or any person who was then planning or scheming to do something for Germany. That is just too ridiculous, isn't it, gentlemen? So the first thing on coming over here in these sworn manifests, these documents, he said he was coming here for good, and he said he was coming here forever. He said he was coming here to be an American citizen.

Is that supposed to be a lie? Is that supposed to be some-
786 thing that has some mental reservation, or is that something said at a time when by no possible chance could he be stating something which was not his true intention?

So when he went back to Germany in 1936 all these ship manifests say the same thing. When he left here to go back to Germany he said he was not yet an American citizen, but he said he intended to be; that he was here for good and just going on a temporary visit, and intended to come back here to stay. When a month or so later he did come back he said in the ship's manifest the same thing, that he was coming back permanently, that he intended to stay here always, intended to be an American citizen. And you will remember that in 1928 when he went to Chicago the first time he was away from the farm and the first time he had any facilities to declare, in some formal way, his intention to become an American citizen according to law, he did it. You remember these naturalization papers. There he was in Chicago in 1928. Then again the first opportunity he had to get his final papers. Because certain continuous residence is required in a certain place. That is necessary. When he was out in Indiana was the first time he had that continuous residence. Then for the first time he was qualified and immediately applied and got
his citizenship. Those are years ago, gentlemen. They go
787 back there to the time when he was so much younger than than he is now. His intention, his declarations, his loyalty, as far as those papers show, was continuous and uninterrupted, and I say I think you must consider that too. And it is the last thing I am going to mention under this subdivision of my broad focus. I think it is important that every time an election day came around after he became a citizen he voted. Now, mind you,

if he had lied about that the Government would have proved it. They have been looking here for every tiny little detail that he might get wrong or get mixed up on or state wrong, and I say to you gentlemen that it would be a much better thing for our country if all of our citizens had the duty of citizenship and going to the polls in their minds every election day as much as this man who came here from Germany.

Does that look like the act of a traitor? Does that look like the act of a man with a deep-seated antipathy to the United States, as Mr. Correa has claimed here? I do not think you gentlemen will look at it that way.

All right, now so much for that broad focus, but now let me get down a little bit closer. You notice I have been bringing it down all the time to things that get more and more to the heart
788 of the case, and I am trying not to leave anything out.

Remember all the time we are talking about treasonable intent. That is all we have here, treasonable intent. That is all that this argument is addressed to.

The first of these as I have them here is: What did Cramer know of Thiel's purpose as shown by Cramer's own statements? Now that is pretty important, isn't it? Well, let me examine into that. I want to make a few preliminary statements. In the first place, you gentlemen have no more right to substitute suspicion for proof on this issue than you have on any other. And I have emphasized again and again that by your oaths you are to decide the case on the evidence, not on suspicion; not on imagination, not on something that you may think may be your pledge.

Secondly, not a single one of these FBI men heard a word that passed between Cramer and Thiel or between Cramer and Kerling. You remember how careful I was to bring that out during the Government's case. Every one of these men that took the stand was asked by me, "Did you hear what was said?" "No; I was not close enough to hear," or "I did not hear." "I saw their lips move. I saw they were conversing but I heard nothing." So that we start there, and you must start there with the fact that these Government men have not supplied one iota
789 of the conversations that took place on the evening of June 22nd and June 23rd, 1942.

And now I say the acts that Cramer did were each and every one of them thoroughly consistent with innocence. His meeting Thiel, his talking there the second night, his being there with Thiel, with Kerling there, his taking the money, putting it in the Corn Exchange Bank, his letter to Norma Kopp, his letter addressed to William Thiel as at the Commodore. I say, gentlemen—and remember anything that I tell you that is not so,

I have got a man coming after me, a man of consummate skill who knows his business and will say it is wrong if it is wrong, don't forget that, and I am not forgetting it either—I say every single one of those acts is just as consistent with innocence as it is with guilt. It all depends, every one of those things, upon the knowledge that Cramer had, upon the intent. Whether they are guilty acts or whether they are innocent acts depends not upon the doing of any single one of those, but upon the intent and the knowledge that the man had. You know that is so if you faced this thing frankly, as of course you do.

Now in substance the testimony of these FBI men is that Cramer insisted from first to last that he did not know what Thiel
790 came to this country for. You remember how Willis testified about that. You remember how I emphasized that again and again. He did say he had surmises and suspicions, but he stuck to his ground from first to last that he did not know what that man came here for. All right, now where do these hunches and surmises and suspicions come from? They are all in the statement, and I am coming to that in a moment. But I want to show you where they came from. And, mind you, in doing this I do not criticize any of these FBI men. When they got Cramer down there that night and they said, "What did you suppose the man was here for? If you suspected that he came in a submarine why did you suspect that?", "What was he here for?" Those questions were perfectly proper, gentlemen, and I do not criticize anybody for asking them. But I want to show you how in this statement all these speculations appear. Let me do it by taking first the speculations themselves. Before I explain how they got in here let us see them, because I am going to take up each and every one of them and you will know them all. For instance here is that last paragraph, and I have now the typewritten statement he signed that Sunday morning, June 28th. He says: "I knew"—and then it is crossed out and the word "know" is put in—"I know that it is wrong for a person to incite
791 unrest among citizens by spreading stories and circulating rumors during war time, but if Thiel had come over to the United States to engage in such activity I would not think of reporting him because I would never betray a friend." You note the "if" and the "would".

"If I did I could never again respect myself. If I had thought that Thiel was here for a more sinister purpose involving violence and destruction I would have tried to persuade him not to do it, but if I did not succeed in persuading him not to do it I would have reported him without letting Thiel know. This would be for Thiel's own protection as well as for the protection of those

who might be killed or injured by such violent acts." Then on that same page, referring to Miss Kopp he says:

"I told her that I had a hunch that Thiel had come over to the United States in a submarine. I said that I did not know what he was here for, but that I thought that he was going to circulate rumors and spread stories among the citizens. She told me that she hoped that nothing happened to him and that he would not be caught."

The next one is here on the fifth page: "At this time"—and that expression "at this time" evidently refers to the previous
792 paragraph which discusses the money; I am not sure, but it seems so as I look at it, here—"At this time, I thought that he might have gotten the money from the German government, but I rejected this thought because Thiel was inconsequential insofar as violent acts and deeds injurious to persons and property are concerned. I have always known Thiel as a calm, dependable character, who had no strain of violence in him. Then the thought occurred to me that maybe he had gotten the money from Dr. Zichaus in Vienna, who left the United States in 1932 and who is a physicist and chemist, or he might have gotten the money from some other prominent person. Inasmuch as I could not arrive at any definite conclusion as to where he had gotten the money I did not think any more about it. However, this thought still hovered in the back of my mind that the amount of money he had on his person and his presence in New York were connected in some way."

And then at the top of that page he says: "I had a hunch that Eddie was here for the same reason that Thiel was, but I did not ask him inasmuch as the previous two times I had asked Thiel why he was here he had put me off with a smile."

Then on the preceding page he says, "My hunch that he was here to spread stories and circulate rumors may have been wrong,
793 but whatever his mission was, I thought that he was serious in his undertaking. I believed at that time that anything he might undertake would be ineffectual and useless. I told him so at that time. However, I did not advise him to carry out his plans, because I did not know the nature of them."

And then, and I think this is the final one on this subject of his knowledge, he says: "I asked him"—and this is when he told him about the safe deposit box—"I asked him if he had come over here to incite unrest by spreading stories and creating rumors. Thiel would not admit anything to me but said again that he would let me know later on perhaps. When Thiel smiled at the questions I asked him about coming over in a submarine and about his reason for being here, I had a hunch that the large amount of money he said he had, had something to do with his

presence here, and the smiles he gave me to my questions tended to substantiate that hunch. I knew that when Thiel left the United States in 1941, his financial condition at that time would not permit him to have so much money and as I said before, I got the hunch that the money he had with him had some connection with his presence here."

How did all those things get in here? You can see from my reading them that in substance he is saying, just as Mr.
794 Willis said on the stand there, that he insisted all the time these men questioned him that he did not know. He had these hunches, suspicions, surmises.

Now why, and how? Let me give you the answer by quoting from the testimony here. Because this is not imagination of mine. You remember how Cramer was talking about leading questions. With all his study of the language and the little book he had in his pocket, he cannot always express himself right. What he meant by that was that the Government men kept asking him these questions for his state of mind. I do not know whether you gentlemen have ever had somebody trying to find out what you were thinking last week, last night, this morning or some other time. It is a metaphysical thing when you get to inquiring about the mind of a person, and what did you think about this on such and such a day, and what did you think about that on such another day. It is almost impossible for anybody to answer that with any degree of accuracy. The natural person of course thinks that of course he ought to answer because he ought to know, and so he tries. That is what Cramer, as I claim, was trying to do here.

And let us see if that is not exactly what Mr. Willis says. Here is my question to him, and his answer, on page 260:

795 "Q. (Continuing)—whether he came over by submarine or not, and that Thiel gave him an evasive answer on it. Now referring, however, to these suspicions that maybe the money came from the German government to him, and maybe this and maybe that, were not those speculations all in response to repeated questions by you and the other agents to the effect, 'What did you suppose he was here for? Where did you suppose he got the money?' And things of that kind? Isn't that so?' And his answer is: 'Yes. I recollect that is the substance of it.'

796 "Now, gentlemen, how do you make this out? I did not give the testimony. There it is, and it seems to me a most natural thing. Of course they questioned him about that. There was not anything wrong about it. When Cramer said they asked him leading questions, and their Mr. Correa tried to pin him down so he could get him to accuse some one of these agents of doing something wrong, he would not say that, because he did

not claim they did anything wrong. They had a right to ask him those questions, whether you call them leading questions or suggestive questions. They were prying into his state of mind, and so you find in this statement all these surmises, all these hypotheses, because when he says "If this" or "If that," "I would have done that," how can anybody pretend those are not hypotheses; how can anybody pretend that originated other than by questions by the Government agents; perfectly proper questions, gentlemen. I do not deny that. But I say that is why there are questions, and that is why there is so much of that. Naturally that was what they were interested in primarily, and he thought so. How could he think otherwise? All right.

So much for the statement. I say as far as that statement of his goes, he claimed from beginning to end that he did not know what this fellow Thiel was here for, and that as a matter of
797 fact, he did not. He might have had his suspicions. He might have had thoughts that more or less existed at the time, or more of less were built up when he was questioned. No human being under the sun could be precise about that sort of thing when he is questioned and questioned and questioned. But there is the paper, and I say the substance of the paper when you get all through is that he denied that he knew the purpose that Thiel came to this country for, and remember there is no evidence by any Government witness who heard what was said; that void is not supplied by any proof.

Now the second narrow focus has to do with the $200 indebtedness. I don't know whether you gentlemen remember, but when I was opening to you in the beginning I said now we lawyers work on cases, and we come in with our evidence, but it has been my experience that twelve or fourteen men in a jurybox can always add something. You remember how I said when we came to this money business, I want you gentlemen to consider the evidence carefully, you may find more in that than I can make out because I knew it was a little confused. You remember that I said that because I knew just exactly how this proof was coming out.

Now may I have that little book? Book handed to counsel. I do not think there is any doubt that Cramer had some
798 money coming to him from Thiel. I am not going to elaborate on this. You remember I brought this little book in evidence. I did not offer just that page because I wanted you gentlemen to get a chance to look through it. I can not find anything there that casts much light on it but, as I said, you are men of experience. You can add a lot of things I could not think of. But here is the page where he put down the money

that he had loaned Thiel from time to time, and you remember it is not added up right. He did not say what those ten-cent items were that were added to each one of them, or what they were for, and the total is not exactly $200 but it is $217.50; part of it in 1935 and part of it in 1937. Now I do not know. There it is. I do know that Cramer claimed that when he met Thiel and they talked about it that having agreed that his indebtedness was in the neighborhood of $200, and that one of the things that actuated him about taking this money and putting it in the safe-deposit box was that that was a chance for him to get his $200 back—I don't know whether that strikes you gentlemen as a matter that would be of interest to him or not. It seems to me very obviously that it would. Cramer was a careful man. There he was with his modest employment, saving up a little, a little, a little, until he got enough money to go back to Germany to visit his folks there in 1936. Now just imagine the amount of saving he did over all those years to get that $400 or $500 he needed for it. He was a careful man; careful about little sums of money. Now, as proof of the $200, and mind you, this book and this little slip were things he had no opportunity to make up after the Government got hold of them. The book was up in the room there and when he was arrested he had no chance to go back and get the book or do anything to the book, and as far as this little slip is concerned, this was in his wallet when they arrested him, so he did not have a chance to say suddenly, "Excuse me. I will go into the toilet," and then write some things. When they take hold of a man they make mighty sure what he has in his pockets, so that is the way it is. And yet here on this slip he has the number of bills, the denominations, the eight gold notes. He told you he thought maybe they could not be used as money and they ought to be put separately, and he noted them on the memorandum and he put them separately in the box there, and here it says 3670 minus 200. I say to you gentlemen, I don't know the exact details about this, but I do know that there is every reason to believe that Cramer's story is absolutely true; that he was to get 200 and he was to get $200 because it was owing to him.

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Now let me give you just one other thing that I think is very convincing here. I want to refer again to the testimony of Mr. Willis, and I may say that my idea of a man who is a perfect man for his job is Mr. Willis. He is keen, he is careful, he is shrewd and he is honest. When he comes and tells you something; when he questions a witness to get something out of a witness, he is not interested in just getting a conviction; he is not interested in pursuing somebody like a bloodhound; he is interested in the truth, he is interested in justice. And I tell

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you, gentlemen, that is the finest thing I could ever say about any man who is a Government agent. That is the way they ought to be and that is the way he is. He has done a marvelous job in this case, and in doing it he has never, one moment of the time, let a single thing come over that might put a greater burden on the defendant than was just, and, as I said, in my judgment, that is the finest thing you can say about a man who does his work.

Now here is what he said about this $200: "Cramer has always asked me"—You remember how Willis was questioning Cramer from time to time; there were a series of times he was talking to him, and I am reading from page 256—"Cramer has always asked me about the status of the $200 which Thiel told him he could keep. He has always elaborated on that to me too." And then a little lower down, "Each time I saw Cramer he would explain in detail his theory of why that money"—that is the $200, I interpolate there—"belongs to him, and asked me about its safe keeping."

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Now, gentlemen, is that persuasive? Does that tend to make you think that what Cramer was worrying about when he was up there in jail and they were questioning him was this $200? I tell you that man never understood for a moment what a jam he was in here. That is one thing that stands out in this case like a sore thumb. He was more worried about his $200 up there than anything else, and that is the significance, as I see it, of that testimony of Mr. Willis there.

All right. So much for the $200. Now the third thing—in this close focus is Mr. Ostholthoff's testimony. You remember Mr. Ostholthoff said he was there that evening and at first Cramer lied about Thiel and he claimed his name really was William Thomas, and all this and that, and then when he finally said "You do not understand what a jam you are in; you better be careful," he said, "Let me speak to Mr. Ostholthoff alone," and Mr. Ostholthoff said, while all the other people were out of the room, that Cramer then told him that this fellow's name really was Thiel and that he had gone back to Germany and he had not gone out to the West Coast to stay at all. And then he added one additional statement which is the only thing, as I see it, that Cramer has denied here. He said that Cramer told him that Thiel had told Cramer that he was over there on a mission for the German government.

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Now I say, and my argument now is addressed to whether or not that statement really was made to Ostholthoff that there are a variety of considerations and I want to show you them.

To begin with, doesn't it seem a curious thing that there is nothing about that in this typewritten statement here; not a word of it in there? Is it conceivable that when Ostholthoff had that talk

with Cramer in the absence of the others, he did not tell Willis and the other FBI men about it, when they came back in the room? Isn't it a certainty that if it happened he certainly would tell them? It was the most important thing, if it occurred, that occurred that evening or the next day or at any other time in those talks. Surely if it were so he would have told them about it. And if he told them about it, they certainly would have added it to the statement. There is no disproof of Cramer's claim that whatever they put down and asked him to sign he signed. They could have called these men back in rebuttal to prove that was not so if such were the fact. Cramer claimed, and I say to you gentlemen the evidence here supports it, that everything
803 these men got up there after talking with him which they asked him to sign, he signed. Indeed, as to this paper here, you remember there are several little places where there are changes, where there are additions. There is no claim that they ever submitted a paper to him having any such thing as Ostholthoff testified to in it, and he refused to sign it. If they did prepare such a paper and showed it to him and ask him to sign it, and he refused, wouldn't they have called these men in rebuttal to testify to you gentlemen? I say to you gentlemen that Ostholthoff must be mistaken about it. It is human to make mistakes. We all do. I do not say he wilfully falsified here. I told you in the beginning, and I repeat now, that I make no charge against these FBI men, but after all, people can be mistaken about things. But what we are interested in is the written statement which is supposed to have in it the various things that were stated by Cramer. You do not find anything such as that statement that Ostholthoff testified to and tossed out and that Cramer would not sign it. It just is not in there at all.

Let me show you what Mr. Willis testified about it, because you remember Mr. Willis came on first, and when I was cross-examining him I could not have had the slightest idea that Mr. Ostholthoff was going to come on again later and add this additional
804 detail. It could not possibly have been in my mind, and yet, as a lawyer of experience, I naturally wanted to exhaust the conversation so that if there was anything more Willis knew about what had been said that Saturday evening, I would not be at fault, and you remember how I plugged and plugged to do it. I did it by instinct, because that is the way any good lawyer would do, so he would not leave holed open behind him.

Just let me read you some of the testimony of Mr. Willis, because I am claiming to you gentlemen that if such a statement were made to Mr. Ostholthoff he would certainly have told Mr. Willis and the other men as soon as they came back in the room. If he told them that there would certainly have been additional

questioning of Cramer, to be sure that such a statement had been made and every effort to get it down in writing just as they got everything else under the sun in writing out of him. I am going to try to show you from the testimony of Mr. Willis that no such thing as that ever came to the attention of Mr. Willis at all.

Let me try to do it here with care, page after page. It won't take me very long. I know I am taking a long time, but I have to do that, gentlemen, and I am trying not to make it any longer than I can help. Here is the first part on page 234:

"Q. Have you told the jury all that you remember
805 that Cramer said during that whole evening [referring to this Saturday evening]?—A. If you mean have I answered every question put to me, I say definitely yes."

And then going on, because I never like to pass people in a fog, I like to meet them head-on, so you know where you are getting:

"Q. No; I do not mean that at all. I thought there was probably more to it [Meaning the statement made by Cramer], and I don't think for a minute you are holding any of this back on purpose, and you know that. But I want to be sure if you told the jury all that you remember that was said by Cramer during that evening?—A. Yes, I have."

Now let me go on:

"Q. Have you told them all that you can remember?—A. All that I can remember sitting right here.

"Q. Let me see if I can help you a little; I am not sure that there is anything further, but I just want to make sure. When he asked to be left alone with Mr. Ostholthoff of course you don't know what he said to Mr. Ostholthoff while you were out of the room, do you?—A. No, sir.

"Q. And when you came back isn't it a fact that Cramer made a statement to you and to Mr. Ostholthoff together?—A. He corrected his previous assertions.

know what he said to Mr. Ostholthoff while you were out of the

"Q. Well, I wish you would tell the jury about that so
806 they will get the full picture of it.—A. Well, he said the man he told us was William Thomas was in reality Werner Thiel and that Werner Thiel was a friend of his whom he was protecting, and that Werner Thiel had given him $3500, $3600, which Cramer was keeping in the safe deposit box, and that it was not from the sale of securities, that the money was in fact not Cramer's but Thiel's."

Nothing about saying that Thiel told him he was here on a mission from the German Government.

"Q. Did he say why he had made the misstatements that he

had made in the beginning?—A. Yes. He said he wanted to protect Werner Thiel.

"Q. Was that statement that he made, as you have just told us, put down in writing? Didn't you get him to write it out and sign it?—A. Not that night; no, sir.

"Q. Wasn't there some stenographer or other person taking down what he told you and Mr. Ostholthoff that evening?—A. No, sir.

"Q. So that we can leave that with the assurance that you told the jury everything that you can remember about that interview, in substance?—A. Yes, sir."

And I say, "that is what I want to be sure of."

Now there is no place where we come back, and you remember he said about how the next morning they were continuing talking with him, MacInnes and Willis, the next morning, Sunday. I see this on page 247:

807 "Q. When was the next interview?—A. Starting eleven a. m., Sunday, June 28th.

"Q. Was it on that occasion that the writing which I have requested was obtained from him?—A. Yes, sir.

"Q. Before the writing was prepared did he make a statement orally?—A. Yes, sir.

"Q. And then the paper was prepared for the purpose of perpetuating in definite and definitive form what he had stated to you and others orally?—A. Yes, sir."

Now that morning there was only one other person with Willis and that was MacInnes; so when it says "the statement to you and others," it could not have had any other possible meaning except whether that written statement was got up so as to include what he said that morning, and what he said the previous evening, and, in any event, I told you gentlemen that, reading this testimony of Mr. Willis, it is inconceivable that Mr. Willis would have testified as he did without saying a word about any such claim that Thiel had told Cramer that he was here on a mission from the German government, if Willis had known of any such statement. I sewed that up in every way that a person can do so as to get the complete conversation and the full purport of it. I say Willis knew nothing of it; I say if he knew nothing of it,

808 then in all probability it is one of those things that did not occur; I do not charge Mr. Ostholthoff with deliberately saying that. He probably thinks it was said. But I say that is a mistake. I say the preponderance of evidence does not coincide with that. I say you gentlemen cannot possibly find on this record beyond a reasonable doubt that that was said because of the circumstances I have mentioned, and particularly

this written statement here that contains all those things that Cramer is supposed to have told these men, and it does not contain one word about that particular statement that was claimed to have been made.

So much then for that, and we come now to Miss Kopp, and I think you will agree that I have kept my word when I told you that the focus is becoming closer and closer as I proceed, so that you may have the full picture, so that you may even get it microscopically. We gain nothing by holding back any of these details from you gentlemen; not one iota.

Now as to Miss Kopp let me say this: first, isn't it perfectly plain that Thiel's relations with her were such that they were simply—that she was his girl friend. Is there any doubt about that? Isn't the evidence perfectly complete on that? She and he were in love. I happen to think, although I may be wrong, that one of the things that shows that about as plainly as anything else is her admissions that they quarreled together.

809 She claimed he was going out with some other woman and he claimed she had been going out with some other man, and they fought around, and they were engaged to be married, as she testified. That is the relationship between Thiel and Norma Kopp. I say also that it is similarly clear that she is no spy, nor any member of any spy ring or connected with spies in any way, and the proof of that is that she walked into this courtroom and walked out of it a free woman. If there was even the slightest suspicion she was a spy or connected with spies, she would be in jail just where she would belong. And the fact that she is not, it seems to me indicates that pretty clearly.

Now I mention all this because to read the indictment you would get the impression that this letter that Cramer wrote to Norma Kopp about the "sensational news" he was going to give her, you would think from the indictment that he wanted to get in touch with her so she could do some spy work. I say, gentlemen, it is so clear that there cannot be any reasonable debate that the reason Thiel wanted to see Norma Kopp was because she was the girl he was engaged to marry and that is why he wanted her to come in town, and not for any spy work at all, and that is naturally the reason he looked for Cramer.

Now Miss Kopp said things that we claim are absolutely

810 not so. She is the only witness in the case that I can say, speaking to and looking at you gentlemen as I do, who deliberately lied, and I am going to prove it to you. She lied not once, not twice, but many times.

Let me have that newspaper [exhibit handed to counsel]. Do you gentlemen believe for one moment her testimony that when

she looked at this newspaper with the picture of the man she was engaged to marry, and the headline "Saboteurs landed in U. S. by U-boats and equipment to be used in destroying key war plants," do you believe for one minute her statement that she looked at the picture and did not read a word of the printed matter? I do not believe there can possibly be a man in this jury box who would believe any such thing as that. Of course she read it, and she read it from beginning to end. Here [indicating] there was a little paragraph head, "Werner Thiel" in bold-faced type, and there were a lot of other things. You gentlemen looked at the paper at the time. I do not need to elaborate. The statement was a palpable falsehood. That is one sure thing we have to start with. No woman who is engaged to marry a man could possibly see a newspaper showing that he got in a jam such as this without reading it with avidity, every word that was in there.

Now what else? Well, she lied in a half a dozen different
811 ways. For instance, she said, when I asked her about being dressed up that Saturday, yes, she was all dressed up; dressed up in order to meet Thiel? Oh, no; not dressed to see Thiel; she was dressed up on general principles. And so it was with a half dozen other things. I am not going to take the time to elaborate them because I think you gentlemen remember them. You saw the shifty way she testified. Maybe you could not tell it as I could when I stood back there. She would not meet my eye. I know what there is when one man looks a person in the eye. You know that just as well as I do. You could not just get that woman's eye. She would not look at you for a second, and I think you gentlemen watched her. She would glance at the jury and at the judge and her eyes never stayed in one place for more than a second or two. She was lying all right.

Now there has been in the law from time immemorial, a rule that is one of the most salutary rules that exist, and we lawyers call it the falsus in uno rule; the way it reads in Latin is, falsus in uno, falsus in omnibus, and it means that in every case where a witness wilfully testifies falsely to any material fact the judge, if he is to decide the facts, or the jury, may disregard the entire testimony of that witness. Now mind you, I do not tell you that you are required by law to throw it out. I say the law says
812 that if you find that a witness testifies wilfully falsely on a material point you are at liberty to disregard his entire testimony. And that is what I ask you to do in this case. Without the testimony of Norma Kopp I say you gentlemen could not possibly find a verdict of guilty in this case, and I say I see no possibility of your finding what she said was true beyond a reason-

able doubt, and you cannot do it gentlemen. Her testimony is not worth it. There is a person who has, as far as all of us are concerned, has plainly and clearly lied, not once, but many times.

Now there is another point to this; when you speak of a person lying, people do not do that for fun. You would say, Why, she was Cramer's friend. She was engaged to marry Thiel. Why should she lie against Cramer? Well, I will show you the motive; it is just as clear as anything in this world could be, and it must have been plain to you when I questioned her again and again as to why she would not admit reading the newspaper. Why, she was thinking of Norma Kopp. She knew the minute she saw Tony Cramer arrested by the FBI men and taken out of that Kolping House that night, that she was on the brink of serious trouble herself, and the best way to get out of that was to cook up a story that would help the Government against Cramer. That is the easy way to buy your way out.

Now mind you, I am not accusing the Government of
813 making any deal with Norma Kopp or promising her any immunity or anything like that. Mr. Correa would not do such a thing in a case involving spies; in a case involving people who possibly committed crimes against the United States Government. He would not stoop to make any promise of immunity to a one of them. I know him well enough for that. He would not do it. It is just not in him. I do not make any such claim as that. And I say she knew the best way to keep herself out of trouble and that was to just add a little bit here and a little bit there. She read that newspaper all right. It did not take a very smart woman, after she had read what you gentlemen are going to see in that paper, to know just what she needed to add to make her testimony of value so that she would save herself, which is what she has done.

I tell you gentlemen to have Cramer punished and that woman free, to have Cramer and that man Burger, that fiend who came over here from Germany to blow up our factories and destroy our railroads and kill our people, to have him free while Cramer gets punished, I tell you gentlemen it is not right and I don't think you are going to do it.

Now let me come to another thing.

The Court. Mr. Medina, you realize you have considerably exceeded the time as it was divided up.

814 Mr. Medina. If your Honor please, as I explained to you in chambers—

The Court. We won't discuss it. Just take more time if you want.

Mr. Medina. Very well, your Honor, thank you. I don't think

any of you gentlemen will hold it against me that I have taken a little longer than I thought I would. I intend to defend this man to the utmost of my powers. I do not know how other lawyers look upon the job of defending someone, but to me it is not a perfunctory task; it is not just to make the motions, it is to do the job, and I am here to do it and I have not any apologies to anybody for it.

Now this Constitution. How any of you gentlemen can honestly believe that these ink marks that are put here on these various places, including the article on treason, indicates that a man of Cramer's make-up could, back a year or a year and a half or two years, or whatever the years were, ago, do that because he was contemplating the commission of treason, is beyond me. It is just ridiculous. It is absurd. The natural inference, the only one any reasonable person can make, is that he marked these, as he marked the other things, that he was studying there. Just look at them. I do not see how you can fail to see that each
815 one of them is something that a man such as Cramer would not understand, curious provisions; things he would want to wonder about and try to ponder out; things that any American citizen might want to. But if there were more people, whether they were born here or not, who would take the trouble when they found it, whether it was in a wastebasket or whether in a subway or wherever it was, to take a copy of the Constitution and study it over, it would be better for many of the people here. You know some of our foreign-born citizens do those things that we people who live here all the time ought to do, but we do not. And here is this man having done something that was the duty of citizenship, having done something that was carrying out what he was supposed to do, mind you his oath was taken only a short time before September 17, 1937; he became a citizen in 1936, and he swore to uphold the Constitution and laws of the United States, and there the foreign-born, humble man, finds this paper and goes over it and marks the various places, and then, think, gentlemen, it is brought here before you against him for treason for doing that. I believe it is not right. How can this paper possibly show any treasonable intent?

Now I do not want to talk about it any more. There is not a thing in this case I feel more strongly about than this paper here, but you take it and when you go out there look at it.

816 Now listen to what this treason business is, and it is just the same kind of a technical, obscure thing as the letters of marque and reprisal and the various other things; the bill of attainder and the ex post facto laws and the various other things he underlined. Listen to it:

"Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them *aid* and comfort."

Do you suppose that could have meant very much to Cramer? When I got into this case I had to do plenty of studying to find out what those words meant. I had no experience in treason cases. And there is plenty of law on it; hundreds and hundreds of cases going into the question of the definition of those words and what they mean.

Listen to the rest of it:

"No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court."

That is a curious provision. There is nothing like that about any other crime in our law. It is unique. It has a historical background that Cramer could not possibly have understood anything about, and then it says:

"Congress shall have power to declare the punishment
of treason but not attainder of treason shall work cor-
817 ruption of blood or forfeiture except during the life of the
person attainted."

Now I say, gentlemen, it is a perfectly natural thing for a man to mark that as something he did not understand; something he wanted to ponder on just as he would about the ex post facto laws and bills of attainder or letters of marque and reprisal and so on, or habeas corpus, too. I don't think he knew anything about that. It is referred to here, and perhaps will be a summation for the purpose of intimating that he was talking about a declaration of war; he was talking about habeas corpus; he was talking about treason; he was getting himself all ready for doing some treason. I tell you gentlemen it is ridiculous; it is absolutely absurd. There is no more connection between this newspaper and this case than there is between chalk and cheese.

I am going to leave that now, and I hope that when you come to deliberate you will take the trouble to see all those places where these marks are there, and don't forget this: there was a piece of paper in which he admitted about this. I will tell you what it was. I think I read it this morning; this thing that is supposed to be so bad with lines on, how do you suppose anybody could have proved that those lines were Cramer's? The law
is that a mark cannot be proved by the testimony of a
818 handwriting expert, because a line is not handwriting.

There would be no way under the sun that anybody could ever prove, except by Cramer himself, that he put those lines on there, and he, in his innocence, just as he did with all these other papers around here, signed this. Here is what he signed [exhib-

iting to jury]. He did not make any fuss about it. He did not hold back or refuse or hesitate. Here is what he says: "I hereby identify a page from the New York Times newspaper dated Friday, September 17, 1937, as having been part of a newspaper obtained by me on a date which I do not recall. The lines appearing on the page of the New York Times were made by me in ink."

Now of course I am not telling you that Cramer knew this rule of law about handwriting experts. I am not saying such a thing as that. I am just telling you that as a fact. Of course he did not know anything about that but he admitted this about these lines, just as he admitted everything else under the sun in this case, and he wrote it out and signed it, and it was retained here by Mr. Willis, and you will find practically every one of these things that Mr. Willis was the man who was with him and talked with him again and again and again, and that is why I quoted from his testimony there.

819 We come down now to a closer focus still, and that is the focus having to do with consciousness of guilt. No man can commit a crime of the enormity of treason without showing in some slight way, somewhere, at some time, a consciousness of wrongdoing. You gentlemen know that is so. It could not possibly be otherwise, and I am going to try to demonstrate to you that from first to last this man acted, in every conceivable way, without the slightest consciousness of guilt; without the slightest realization he had done anyhing wrong at all.

First I have already told you about how he was worried about his $200. He kept bringing that up all the time. If he really entertained a treasonable intent, and was a man in jail for something that might lead to conviction of treason, he would not have been thinking any more about that $200 than he would have been thinking about any other extraneous fact; perfectly ridiculous. There is one little thing—little? I do not say it is too much, but it is there. Now all of these things that have been produced here, except these letters they got up there at Goldstein's place where he had his mail box, they got them all in his room. He did not hide anything up there.

You remember when I had the FBI man who went up to his room on the stand, I took him around the room with a diagram, and he told how he had looked in the radio and did not find anything there, and they looked into the panels and felt of the mattress and the pillows, and they looked every conceivably place they could look, and they found nothing except what they found in drawers that were opened, unlocked, unpadlocked; nothing concealed. This copy of the Constitution with other papers was there right under the radio. The man had absolutely no consciousness of guilt in the situation whatever.

Now there were two things that they say he did hide. They say he had some part of the money in a book called something about music. Well, he did. I wonder how many of you men up in your homes when you have a little money that you want to put away somewhere, I wonder how many of you think it is a good thing to put the money in a book. You have a lot of books and you have a few dollars that you want to put away and there is not any better place to hide it. He admitted that. He did not want to lose it. He put it in there for the purpose of concealment, not because he felt he was guilty of any treason or wrongdoing but because it was a natural thing to do.

Then the matter of the citizenship papers. You remember about that; how the man from the FBI had gone all over the room and could not find a thing except these papers which have
821 been brought down, some of which have been offered in evidence and when he got down there Mr. Willis said, "Where are your citizenship papers?" Mr. Willis said he did not find them. "Let us go and ask Cramer?" and Cramer said, "Oh, yes, I will tell you where I put the citizenship papers. I wanted to hide those; I wanted to keep them in a safe place," so he explained how in the drawer of the desk there was a piece of paper in the drawer and he had lifted the piece of paper up and stuck the citizenship papers underneath, but they did not find them. They had looked all over the place, they had examined the panels and the mattress and the pillow, but they did not locate them. He told them they were there and they went back and got them.

Now we come to this business about the money belt and the shoebox. There is no doubt at all but there is a discrepancy between what Cramer testified here and what he put in his statement, and I want to bring that right out so that you will understand exactly what the difference is there.

He says in here that when he arrived home "I put the money belt in a shoebox." This is when he got home Tuesday night after getting the money belt from Thiel, and he says he "placed the shoebox under the radio." I the money belt there until the next evening, June 24, 1942; when I came home from work I took
822 the money belt out." This is now Wednesday night, "and counted out and found that the money belt contained something over $3,500. I made a note as to the denominations of each bill and the amount of each denomination. I put this note in my wallet." What he said on the witness stand here was that when he got home there that Tuesday night he took the money out of the money belt then, and counted it, and put it in his brief case or some kind of a thing in the desk, and that he took the money belt and put it in the shoebox, and his explanation was that he had been thinking it over and that he thought that what he testified

here to you gentlemen was the fact; in other words, that he had taken the money out of the money belt Tuesday night instead of leaving it in the money belt until Wednesday night. That is the discrepancy, and that is the difference. There is no doubt about it. There it is. I do not see that it makes any particular difference, and it seems to me much more likely that when he got home Tuesday night with the money belt, with all that money in it, you would suppose he would want to see how much it was right away. I would not expect a man like Cramer to put it away and not think of looking to see how much was in there until the next night. I think what he testified here on reflection, on thinking it over, is more likely to be so. But of course my good friend Mr. Correa
823 attributes that, as he would naturally, and as to other things, and I do not blame him, he attributes to that some sinister motive. "Oh," he says, "he is trying to claim that because if that money belt with the money in were put in the shoebox it would be put in the shoebox for some kind of concealment, and Cramer is changing his story so as to get away from that." You gentlemen will have to decide. I say it is the most natural thing in the world that he should open that money belt and take the money out and count it the very same night he got home, and put it in that box, but to say it was put in a shoebox for purposes of concealment, gentlemen, that just will not stand up.

Remember that man went around to the safe deposit box the next morning. If he had any idea there was any reason for concealing that money belt, naturally he would have taken it around and put it in the safe deposit box. It would be concealed there. It was easy to put in his pocket. He had had it in his pocket the night before when he got it from Thiel. I say putting it in the shoebox does not show any consciousness of guilt whatsoever; in fact the contrary. If he was going to conceal it he would have put it in the safe deposit box when he put the money in there.

824 Now there is a suggestion here about this money belt with this initial "W. T." It is suggested that maybe Mr. Cramer tried to obliterate the initials "W. T." You remember when that evidence came out. On this money belt here you can hardly see them. They are visible, but it is claimed that knowing he had something that was dangerous that he tried to obliterate those initials.

Let us see how that stands up. Let me show you gentlemen a little something, because these FBI men are pretty good. You see that little slip of paper there [indicating]. You see that little tiny square, and there are two or three others of them. There's another there you can hardly see, a little tiny square of paper has been taken out and then pasted back [exhibiting]. Did you notice

that there when you got the paper before? There is a little tiny square taken out of there and put back and there are two or three of those. Now you gentlemen will look at those when you get it out in your jury room. A—I said, these FBI men are good. They know how to make chemical analyses. They went over this Constitution with all the art of chemistry that modern science makes available to them, and so did they do the same thing with this belt. I will tell you gentlemen, if there was anything up around that room of Cramer's that could be connected with the obliteration of those initials, modern science would have made it perfectly
825 plain. They had everything up there that was there. He did not have a chance to get away with anything, or hide anything or destroy anything, and I say to you that merely because those initials are obscured, whether by the operation of one force of nature or another—we do not know what it was—whatever it was rubbed them out, to the extent they were obliterated, if you choose to use that word, we do not know; there is no evidence here, absolutely nothing, gentlemen. You are not permitted to go out and speculate to this man's detriment on any such thing as that. You have to be continually alert lest some suspicion, some thought, unsupported by any evidence, comes up in your mind to this man's detriment, and I tell you there is nothing to indicate that Mr. Cramer, for purposes of concealment, or with any consciousness of guilt, took those initials off or tried to take them off.

Now you see when I say to you that I am trying to be sincere, so-called, I meant what I said. I am trying to cover this case fully, and if I leave anything out it will be just not my fault. I won't do it on purpose.

Now we get down to this question of the letters to his family. Well, you knew how they went through the censor. You remember the reference in there "going twice through enemy censors."
826 How could he mean anything else but English and German censors? It has been conceded here that there was not any American censor then. The American censorship was not set up. He referred to it as any person would, in general terms of enemy censorship and that meant the German and it meant the English. In any event, for the purpose of my present point, having to do with consciousness of guilt, he knew perfectly well that these letters were going through the censor. Does that seem like a man who is guilty of treason? Is there some hidden meaning that is supposed to be in those letters? Is there some invisible ink outry such as traitors and spies used, and that the FBI with all their care have not been able to find? Of course not. He knew those were going through the censor and he said so in one of the letters. They were sent openly without the slightest consciousness of guilt.

He signed everything the FBI asked him to sign. I am not going to get all those papers out. He identified every paper; he authorized them in writing to go into the safe deposit box. He gave them a written authorization to go up to his room and get everything that was up there. Every paper the FBI put before him he signed voluntarily. And don't forget this: there is no evidence that they ever asked him to sign a thing that he refused to sign, absolutely none, and if there had been they could have called men in rebuttal to prove it, or have proved it in the first place. So much then for that.

Now I am through with the matter of the facts and I want to talk very briefly on probabilities. My experience as a lawyer has meant to me that the answer always is in accordance with the probabilities. When I was a young man and somebody came in with an unlikely and fanciful story I used to think maybe it was so, but I found as I went on practicing law that the answer always is in accordance with the probabilities.

What are the probabilities here? Well, first let us suppose that Cramer had some knowledge of why Thiel was here. Suppose he knew that he was here as some sort of a spy to do the work of the German government, sabotage or whatever you choose. Isn't it absolutely a certainty that he would have known that it was a dangerous thing? No man, I don't care what his station in life, could fail to appreciate that, and if he did isn't it an absolute certainty that he would keep his mouth absolutely shut when he was arrested? You do not have to be a millionaire to have sense enough not to talk when you are in a jam like that. If this man had any real guilty knowledge, gentlemen, there is not one chance in a million that he would have talked this way when they got him down here to the FBI men. I say it is absolutely improbable. It is contrary to every reasonable impulse any human being ever had. Mind you, there is no middle ground; either he had knowledge or he had not, and I say his speaking as he did and as freely as he did and as many times as he did and the cooperation he gave the Government as he did, is consistent only with the ground that he had no knowledge, which he insisted from first to last he had not.

Now secondly, Thiel was here on the most dangerous mission that any human being can undertake; to go into enemy country in time of war for military purposes. No doubt about that. Is it likely that when Thiel and those other saboteurs came over here that they were told to tell every Tom, Dick and Harry what they were over here for? Is it likely that they were told to take such men as Cramer and tell them all about it and what they were here for? Or is it more likely that they were instructed, and that they in fact did try, to use innocent tools who would serve their pur-

poses without any knowledge? I ask you, gentlemen, what is the more probable, what is the more likely thing? What earthly sense would there be in Thiel here on such a dangerous mission as that, telling a man like Cramer that he was here on some sort of a mission for the German government? Why, he would have to be insane to do that. It is all right for Cramer to have his suspicions and to have his thoughts, some of which he may have thought
829 then and many of which in fact occurred to him only when he was questioned about it, but I tell you it is not probable, it is not likely, it is not reasonable to suppose that Thiel ever told him any such thing because that just would not be the way these fellows operate.

Now just a word in conclusion; without you gentlemen knowing it, when you left the room here this morning, I made certain motions which resulted in striking out from your consideration seven of the ten overt acts for insufficiency of proof, so that there remain now only number one and number two, having to do with alleged conversations at the Twin Oaks Inn, and number ten, having to do with the statements that Cramer first made to the FBI men.

I want you to remember that those are the only things left in here for you to consider, and you cannot find any verdict against Cramer here on anything unless you find the traitorous intent that I have been spending all this time trying to convince you that he did not entertain.

Now I say this; no one listening to Cramer's testimony could possibly think of him as a man who would betray his country and be a traitor. I say he does not fit the part. He just does not fit the part, gentlemen.

In conclusion, remember what I said in my opening; you cannot commit treason by inadvertence; no such thing as that. You cannot convict this man because he was a fool, because he was stupid, because he was negligent, because he did something that if he had any sense he would not have done. You have got to find the traitorous intent.

I thank you for your patience in listening to me. I have been longer than I meant to be, and I have not done that shifting around that I was afraid I might do, because I do get a little excited sometimes. I leave this case with you gentlemen in the confident hope that when you return to this room from your deliberations you will give a verdict of not guilty.

Thank you.

(Short recess.)

Government's summation

Mr. Cohen. May it please the Court, Gentlemen of the Jury: You have listened to a lot of talk today and I realize this is a rather late hour in the afternoon and that you are tired. Some of what you have heard has been of an oratorical and emotional variety, and I can say to you, so far as my discussion of the facts of this case is concerned, you can sit back in your seats and relax, for I shall not attempt to be eloquent nor oratorical, for to my mind neither oratory nor eloquence has a place in the sum-
831 mation. A summation in a case of this kind is a talk about facts in the case, mainly plain and undisputed facts, and I will say that I will try to discuss the facts of the case somewhat more briefly.

At the beginning of any discussion of the facts of this case it is necessary, it seems to me, to dispose of a few spurious issues that have been used, red herrings, if you will, that have been drawn across the path of your attention in the hope of perhaps distracting you from the real issues in the case; straw men that have been set up very carefully and elaborately only to be knocked down on points which are really not in issue.

Let me show you an example of what I mean. Take this argument which was made very emotionally that Cramer should not be punished while Burger goes free. Who said Burger is going or had gone free? Don't you know better than that? What has he to do with this case?

Take the argument about Cramer's examination. You remember this argument about the Friends of New Germany. The first thing about that is that that particular fact was brought into this case by the defense, first upon the cross examination of Willis and then on the direct examination of the defendant Cramer. Let me show you how that came into the case. On the direct examination of Cramer he was asked by his counsel, what caused
832 you to pull out of the Friends of New Germany in Hammond, Indiana, in 1935, and Cramer answered, without thinking, contrary to his practice I may add, that he had, he said, "Well, there were many things I did not like. There was a swindle going on in the Bund." And his counsel came in right away with a question. But didn't you tell Mr. Willis that what you did not like was the marching and the radical practices? Cramer said "Oh, yes. I told him that, and I did not like those, and they were part of the reason, too."

Did you notice, too, we did not hear on direct, any more than the FBI heard when they talked to Cramer, about his connection

with the Friends of New Germany; that Cramer not only was a member of that and said he joined to have a social circle of friends, that he was in fact an officer of the Hammond, Indiana, community. He was the secretary, you will recall he told us, and he was the man who collected the dues; and when I asked on cross-examination "You did not tell the FBI that?" he did not, "I did not think of it at the time I spoke to the FBI about this subject." No, what he said was, "They did not ask me the question." You see the FBI only asked, Were you a member of the Bund? They did not say, Were you an officer? And that is the way Cramer answers questions. That is this humble man who has been characterized here as stupid and unintelligent, and so forth.

833 Now I am not going to build up, as was done here this morning, a picture of Cramer. To my mind the facts of what was done here by Cramer reveal as much of a picture of him as could be revealed, and a far better picture than any we could build up. However, I do want to comment along this preliminary line upon his veracity, because that is important in this case.

Now I notice no mention has been made of the fact that in his testimony on the witness stand here there were many departures, many differences, between his account of what he did with these men, Thiel and Kerling, and in connection with the whole matter, and the account which he gave to the FBI in the written statement which he signed under date of June 28th, which you recall by the way, because it is important on the excuse offered. June 28th was the Sunday of the week during which all of these things happened, that is, the Sunday following: only a few days after most of these events had happened.

The impression was given, it seems to me, that these differences consisted mainly of mere admissions; that is, if there were facts set forth in the statement which he had not mentioned here on the witness stand, the fact he had mentioned on the witness stand but which he had not gotten to mention in the statement. You know, if you reflect back on the cross-examination a moment, that is not just so. That these conflicts between his sworn

834 testimony on the witness stand and his statements to the FBI consist in direct, diametric contradictions in many instances.

To name only a few: for example, the story he tells you now for the first time about Kerling, and how Kerling came here because he wanted to escape from Germany; he liked this country better, and he said Kerling told him that, and he says in his statement, in so many words that he did not ask him, Kerling.

Now he asked Kerling and Kerling told him something or he did not. One must be the fact. Both cannot be.

Remember this, too, Cramer says as to some of these statements when taxed with these contradictions, "Well, I thought it over and I remembered better." Mind you, this is in November, months after all the events happened. He thinks it over and he remembers better the exact details of what happened then than he did the Sunday, two or three days after the event took place. What a commentary that is upon his general credibility and veracity!

Now notice too the change of approach, the change of line, or rather the contradiction which is entailed in his story concerning these contradictions. Do you remember the point that was made, that they made first on the cross-examination
835 of Mr. Willis, which was made again by Cramer in his own examination, to the effect that here the FBI men were bombarding him with questions; they were getting him to search his mind and give every shred of anything these saboteurs had said to him or anything he said to them about why they were here and what they were doing. That is the one side. He says they went after him to such an extent that he came to the point where, as he put it in his own words, "so as not to seem empty-headed I invented these things; I thought of these things and I told them these speculations." And yet on the other hand he turns right around and says "I did not tell them what Thiel told me about escaping from Germany. I did not tell them what Kerling told me about not liking Germany, and wanting to come over here. I did not tell them those things. I remember those things better now. Those things did not seem important at the time and I did not tell them." I say to you again, isn't that nothing but a web of inconsistencies, a maze of hopeless contradictory statements.

There is one other thing: when you examine all of the evidence concerning Cramer's statements, his statements here to you, his statements to the FBI and all these examinations, the first one on the Saturday night he was apprehended, the one that went into Sunday morning, and the second one after he had
836 had sleep and been refreshed and had a chance to think it over, you see there is some line of reasoning to his evasion, to his twisting of the facts and to his falsehoods.

Note when first he was brought in he lied outright. He just did not know Thiel was even Thiel. His name was William Thomas, and he had never been out of this country, which was, by the way, the essential point; that Thomas or Thiel had never been out of the country. The reason it is essential is obvious, and that is the reason Cramer thought it was essential, because

obviously if Thiel had not been out of the country Thiel could not have been at a saboteur school in Berlin, and Thiel could not have been landed by submarine as a saboteur, and that was the one point of falsehood on which he insisted throughout the early part of the interview, an hour or an hour and a half, until the interview with Ostholthoff. Now when it came to the interview with Ostholthoff, Ostholthoff said, as both he and Ostholthoff testified, "You are in a serious matter, Cramer." He also said "We know a lot more about this than you realize." And isn't it apparent that they were pointing out to him in the course of their questioning things that had been observed during the surveillance. Cramer, of course at that time was not sure just how much they did know. Remember what he told you about Thiel pointing out, when they were seated in the Twin Oaks In
837 on June 22nd, that there was a man behind them who seemed to be listening, and you remember how Cramer told him "You better not speak so loudly because there is somebody back there who seems to be paying attention."

Well I wonder whether Cramer still thought, when he was talking to Ostholthoff, that that person listening back there to their conversation was an FBI man. In any event he was frank, or nearly frank, or more nearly frank than he has been in anything said with Ostholthoff alone, and he told him in so many words, "Thiel told me he was here on a mission for the German government." And that testimony stands.

Cramer was frank, but not so frank as to lose his cunning. Do you recall that Willis testified and Ostholthoff testified that Cramer said he wanted to talk to Ostholthoff alone because he did not want to say this in front of all these other men? What do you suppose he had in mind then? Don't you suppose he had in mind just what came about, that some day he might want to sit on the witness stand and testify that he hadn't told Ostholthoff exactly what he had told him? Let us follow that a little further. Remember, no written statement was taken from Cramer that night. He went to bed, he slept; he had breakfast in the morning, and thus refreshed was again interrogated the following
838 day, Sunday afternoon. Now at that time Cramer apparently had thought the matter over and decided to adopt a position. And his position was again a little receding from the statement he made to Ostholthoff, but an attempt, nevertheless, to square with that statement. His position was not that Thiel had told him anything, you see, but that he had a hunch. Thiel had smiled and he put him off, and he had a hunch these things, and "I had a hunch." And he went further. He had a hunch that not only was Thiel on a mission for the German government but—and

this is the interesting part—that Thiel was on a mission which was to incite unrest by spreading rumors.

Now apparently Cramer had some notion at that time that that was not so bad; that he could admit that Thiel was here for that purpose, so that he at least suspected that Thiel was here for that purpose; and he went further: the whole tone, or rather, you might say, the theme of his position at the time of that questioning on June 28th is set forth in that final paragraph of that statement, where he says that is his position. He says, "I would not have reported to you had I known, were sure, that he was hear to spread rumors and incite unrest, because he is my friend. But of course had I known he was here for violence, destruction of property or injury to persons I would have reported him
839 for his own sake and for the sake of the country."

Now that is position No. 2, at the time of the statement of June 28th. He says nothing in that statement about protecting Thiel from a draft charge, not a word. But as Willis testified, he elaborated on the statement later in subsequent interviews. And in his elaboration his elaboration was along the line that Thiel was involved in some draft charge not mentioned in the statement, because now we are getting into another position, you see, and that that was really the thing that accounted for his wanting to lie on Thie's behalf to cover up Thiel. And the reason why he thought Thiel was using a false name and all the rest.

Now we come up to the trial here. Having seen the Government's evidence, sitting here throughout the trial, Cramer has realized that his position so far as this matter of spreading rumors and inciting unrest being the mission of Thiel and Kerling, is untenable and dangerous, now he takes an entirely new tack which you heard on his direct examination, and that tack is that Well, these men told him that they were refugees, in effect, from German oppression, that they wanted to get away from Germany and they had seen an opportunity and they seized upon it.

Never told to the FBI, wholly a new invention but never-
840 theless his statement now, on the trial.

I do not think it is really necessary to argue to you, or any of you, at great length Cramer's veracity and credibility in the face of these facts which have been demonstrated to you by the evidence and by his very appearance on the witness stand. Remember, gentlemen, in a criminal trial, or for that matter in any kind of trial where you act as jurors, you are entitled to take the evidence through your eyes as well as through your ears. Very often the way a man says something is equally important as what he says; and keep that particularly in mind when you re-

member the picture of Cramer sitting up there on the witness stand, not on his cross-examination alone, but on his direct examination as well.

Now at the outset of any discussion of the evidence in the case, let me again refresh your recollection very briefly as to the charge. Treason consists, as you have heard, in adhering to an enemy, giving him aid and comfort. In this indictment the treason charged to Cramer is specifically in adhering to two named enemies of the United States, Kerling and Thiel, and giving them aid and comfort. The evidence here has shown not only that Kerling and Thiel were enemies of the United States, but specifically what kind of enemies they were, what it was their mission to
841 do here. Now we think that the proof supports the inference, and by the way, if I may digress very briefly, do not fail to distinguish between inferences which you are entitled to draw from circumstances consistent with no other hypotheses or conclusions, and suspicion about which you have heard so much; an inference properly drawn from evidence, competent evidence, is not suspicion; you are entitled to draw it and rely upon it in arriving at your conclusion as to what the facts in this case were.

But to continue: We think the proof supports the inference that Cramer knew what kind of enemies they were, and I will have more to say about that a little later in the summation. But be entirely clear about this—and this is important—that whether he knew or not, and all Cramer had to know to commit this crime was that Kerling and Thiel were enemies, he did not have to know what kind of enemies they were; it does not matter whether he thought they were here for the purpose of sabotage or whether he thought they were here for the purpose of espionage, or whether he thought they were here for the purpose of propaganda of spreading rumors and inciting unrest, or whether he thought they were here for any other hostile purpose you can imagine. All he had to know was that they were enemies. The law
842 does not permit a man to say "I hated this person, knowing he was an enemy, but I thought he was this kind of enemy and it turned out he was another kind, and therefore I am not guilty." The law makes no distinction, wisely so. An enemy is an enemy, and he who adheres to him in giving him aid and comfort is a traitor and nothing else. After all, it is just as if one of these saboteurs had taken one of these blocks of detonated bricks which you saw and tossed it into a war plant at night, intending, or thinking only to destroy the plant, to commit sabotage of materials, and it turned out there was a night shift there and he had killed several hundred people. He could not be permitted to say, "Well, I did not intend that kind of

sabotage; I intended only the destruction of property." And so it is as to the kind of enemy. Now just that one point on the law.

Now let us turn to a brief chronological review of the facts. And at the outset I want to say about this crime that its gravity and the seriousness of what was attempted here is in no way diminished by the fact that it was unsuccessful. That was not Cramer's fault, and I think you can be sure of that from the evidence. I think it is a great tribute indeed to the diligence and vigilance of our Federal Bureau of Investigation that this insidious stab at the very vitals of our war effort was thwarted so speedily and so successfully as it was. But it does not,
843 mind you, diminish one bit from the gravity of the crime, from the crime of those eight men or the crime of this defendant with which we are concerned here.

We have shown the genesis of this desperate try by the German high command to strike at our war effort from within. We have shown you how picked men of the German army were chosen and how they were carefully groomed for their dangerous task. Now have in mind, too, as I think is reasonably inferable from the evidence, that these men were chosen as much as anything, it would seem to me, upon the basis of their knowledge of this country, the basis that they lived here before. Both Kerling and Thiel had. I believe Burger testified he had, too. And their acquaintance with people over here upon whom they could call. Doesn't that seem a most reasonable inference as well? after all, this whole thing was so carefully planned, with typical German thoroughness, that it is inconceivable that the High Command made no arrangements, made no provision as to whom these men should contact, when they arrived here. That they just, as it were, dropped them over here with general instructions to blow up aluminum plants and nothing more. I say to you that this proof is susceptible of no other inference.

Now remember in that connection Cramer's letters, and I
844 am going to have more to say about that on the issue of motive, but on this issue remember his letters and remember that despite his evasions on the witness stand, and they were many—including even fighting on the translation when he was pressed for the point, where he had to admit that this was what he had written, and then he translated it by leaving out a whole phrase, and when we pointed it out to him he had to admit that he had mistranslated it. Remember that despite all that his letters give a pretty good indication where his sympathies were. Remember the German principle, or the Nazi principle of which we have heard so much, that citizenship means nothing, that once a man is born a German he is always a German and that his

assumption of some foreign citizenship is a matter of convenience merely. Contrast with that, or compare with it, rather Cramer's letter to Thielmann of April, 1942, a portion that has not been read today, where he says to Thielmann, "You are lucky to have become a citizen just at the right time, otherwise you might perhaps also experience difficulties." And you recall he was referring to the rounding up and internment of enemy aliens in Yorkville in the context of that statement. Recall, too, his letter to his family, which is one of the two that were returned because service was suspended to Germany at the outbreak of war, where he says, "Every day here I hear the shrieks of hatred and the clamor for the annihilation of Germans from the hostile foreigners." Whom did he mean by "the hostile foreigners," I wonder?

Now coming back to the development of this plan as it was unfolded in the evidence. We have shown how, after careful training, these men were equipped. You have seen here certain pictures of the various lethal weapons, the infernal device of one sort and another, explosives and bombs and detonators and all of that with which they were equipped to perform their assigned task over here. We have also heard of one equally important weapon with which they were equipped, one equally essential to the success of their mission over here, and I refer to their money belts, the money belts filled with substantial amounts of good American dollars, American currency. As a matter of fact, the proof has traced on of those actual money belts all the way from the Nazi naval base on the coast of France, where it was given to Thiel, to its last of ultimate resting place up in Cramer's apartment up in Yorkville. You have heard that, and this is important and will become significant in connection with the evidence of the meeting, how before these men left they were divided into two groups and a leader, a commanding officer if you will, was designated for each group. And you have heard that Kerling was the leader designated for the group of which Thiel was a member. That is the group that landed in Florida, and the group with which we are mainly concerned in this case.

You have heard how fully equipped prepared as they thought for all contingencies, the two groups embarked on submarines and set forth for the shores of America. Curiously enough, from Cramer we have heard a little of what happened on that journey, for Cramer tells us that Thiel told him that the group of which Thiel was a member, Kerling's group, or rather the submarine in which they were travelling, was bombed on the way over. And I think it quite likely that in that small respect Cramer's testimony of what Thiel told him is probably true.

The evidence has indicated how the Kerling group arrived here on the shores of Florida, near Punta Vedra Beach, or whatever the name of the town is, how they buried their equipment and their uniform caps and proceeded to Jacksonville. We have evidence, the evidence of the various hotel people and the hotel records, that both Kerling and Thiel were in Jacksonville. And we have evidence that within a few days after they landed—they landed, I believe the testimony was, on June 17th, and on June 21st both Kerling and Thiel arrived in New York City at the Commodore Hotel.

847 Now the proof shows, too, that this arrival of Kerling and Thiel in New York, more than 1,000 miles from the site where they had buried the materials and equipment they expected to use on their mission over here, was no aimless wandering on their part. They were not in New York 24 hours before Thiel had contacted his old friend Anthony Cramer. And you recall, too, the mysterious manner in which that was done—the note pushed under the door, an anonymous communication referring to "Franz from Chicago" whom Cramer says he never heard of; he says the name meant nothing to him. And while we do not have the note, Cramer—this man who saw fit to keep an unmailed postcard for over a year—did not see fit to preserve this note for one day, according to his testimony, as he quoted it; and according to his testimony it says "Be at the Grand Central Station tonight at 8 o'clock, the upper platform near the information booth. Franz from Chicago has come into town and wants to see you. Don't fail to be there."

Well that is a curious communication, isn't it? You notice the almost military tone? "Don't fail to be there." This is no request or suggestion. That is a command. I wonder whether there was anything else in that note that you haven't heard about? In any event, although Cramer says he knew no Franz from Chicago, knew no one designated or who might be designated by

848 that name, that it was no code name or prearranged nickname or anything of that sort, nevertheless he went down, according to his testimony, to Grand Central Station to the appointed place, at the appointed hour, and there he ran into Thiel. And that was the evening of June 22nd.

Now Cramer and Thiel spent that evening together, some three hours. I do not propose to bore you with a recital of Cramer's equivocations, contradictions, his backing and filling on the subject of their conversation that evening or on the subject of his meeting with Thiel that evening. We do know that there was an earnest conversation, lasting over three hours. Clearly we do not know the whole truth about that conversation, but I

think, fairly taking all of the evidence into account, this much may be gleaned: Thiel was not long in telling Cramer that he had arrived here by submarine. He discussed the incidents of the journey, the bombing for example, discussed the fact that he had come, as Cramer says in his statement, from or through Jacksonville, Florida. Second, Thiel made it plain to Cramer that he was here on a mission for the German government which, I might add, seems scarcely necessary in view of the disclosure of the manner of his arrival here. Who comes here in time of war by submarine except someone on a mission for the German government?

Third, Thiel told Cramer that he had a large sum of money for use in carrying out his mission. Cramer says that was "hunch." I think you can fairly infer that Thiel had told him in so many words and he sought Cramer's help in concealing this money and safekeeping it while he was here. The fourth and most important thing we can gather is this: Cramer fell in with the plan completely, without hesitation, as Thiel must have known from his letters he could be expected to do. Cramer was willing, even eager, to keep the money and the money belt for him. He was willing, even eager, to meet him again as soon as he could, the following evening. As you recall, they met that day, and they did meet. Now, significantly, however—and note this—Thiel did not give him the money belt that night. This was the night of June 22nd. Cramer says it was all arranged. He suggested that he take it, and Thiel said that that is fine, but he did not give him the money belt that night. The following evening, June 23rd, they met again pursuant to the arrangement they had made. And again they spent the entire evening together.

Now before going into the conversation that evening let us look at what, objectively, we know happened that evening, from facts other than conversation. First we know that Thiel and Cramer sat there at the Twin Oaks for a little while and Kerling came in and joined them. And Kerling sat there for a short time, about a half hour if I recall the testimony, and talked with Thiel and Cramer and then he left. Now remember Kerling is the German soldier who was designated by the high command to lead the group of which Thiel was a member. He was an officer. And he did not know Cramer. We have that, too. Very well. He met him once casually.

Now the next thing we know is that after Kerling left, and only after, Thiel went into the men's room and took off the money belt and gave it to Cramer, and Cramer took it home with him that night. Now from those facts, apart from the conversation, isn't it perfectly clear that Kerling came in there as leader of the

group of which Thiel was a member for the purpose of looking Cramer over, that Thiel had vouched for Cramer to Kerling, that Kerling wanted to see for himself, that he did come in there, that he looked him over, and that he found him satisfactory and gave Thiel clearance, because after Kerling left Thiel turned over the money belt? Isn't that a perfectly reasonable fair inference, just from those facts alone, without the conversation?

Now of course from those facts, the facts concerning the money belt and Kerling's position in this group, we get much light as to what the conversation must have been. When it comes to Cramer's testimony again we get little help from a mass of conflicting statements. This, however, I think is clear: Kerling made no bones about disclosing to Cramer that he had arrived with Thiel a few days before, and Cramer knew—I think Cramer he says "hunch" or "suspicion" or "guess," or whatever it is, but I say he knew—that they came in the same manner, naturally by submarine and in the same submarine.

Now remember, here is Kerling. Kerling is in effect an officer. I do not know whether he was commissioned or not, but he was designated as leader of a group that had a very dangerous mission over here, and Kerling did not know Cramer. Cramer says he did not know Kerling well, that he met him once in Yorkville. Do you suppose that Kerling would have come in and discussed with Cramer, a stranger, a nodding acquaintance, the mode of his arrival over here, the date of his arrival, the fact that he had come with Thiel, unless Cramer were in on it, unless Thiel had vouched to Kerling for Cramer, unless Cramer were the trusted confidant of the two of them?

Cramer and Thiel remained together for the rest of that evening, and it was during this evening that they had further discussion about Norma Kopp. The significant thing, it seems
852 to me, concerning what Cramer did for Thiel in the matter of Norma Kopp, is the fact that Thiel needed someone to get in touch with Norma Kopp for him. She was not in town, she was out in Connecticut. And Thiel needed someone who could bring the news to Norma cautiously. In other words, if Thiel took some acquaintance of his and Norma's who did not know what Thiel's mission was here, or that it was a dangerous and secret one and just said to him "Now you tell Norma Kopp that I am back in town and I would like to see her," Norma getting that information would see no harm in spreading it among her friends—"Thiel is back." So it was essential that Thiel have someone to break the news to Norma who himself—that is, the one who broke the news—would be in the know and would know how to do it cautiously. Thiel could not do it himself, because, remem-

ber, these men indicated throughout a great aversion to writing any letters. Remember the note that Cramer got, the "Franz from Chicago" note. Thiel could not do that himself. He did not want his own name to appear in any communication. Now that was the real service that Cramer performed in writing the letter to Norma, and that is the real reason why Cramer was the one that Thiel asked to do it.

Cramer knows perfectly well that that is so. He knows perfectly well that that is the real reason, and he has demon-
853 strated that knowledge by his conduct on the witness stand.

Do you recall his answers when his own counsel asked him the question, apropos of this conversation, "Why couldn't Thiel write to Norma himself?" Well, I have that listed here. He gave four different answers to that, one after another, as the question was repeated. He said, first, Thiel did not know the address. His second answer, he did not have any reason, he simply wanted to make sure she did come and see Werner. His third answer, Thiel was afraid that if his name were mentioned to Norma she might faint. And his fourth answer, Cramer wanted to have, as he puts it, the gratification of bringing the glad tidings to Norma.

What was he doing all the backing and filling about? Don't you suppose it was because of the knowledge he had of the real reason, the reason he did not want to say and he wouldn't say, no matter what the truth was? In any event the proof has shown that Cramer did exactly what Thiel asked him to do. He wrote the letter to Norma. Norma came down to see him. And then Cramer disclosed to her that Thiel was here, and how he had arrived, by submarine. And the important fact, because if you recall it was important for Norma to know that Thiel was here on a mission for the German government so that she committed no indiscretion
854 in disclosing his presence here, Cramer told her Thiel was here on a mission for the German government.

Now another thing he told her which is rather significant. You recall the implication that it seemed to me was made, or attempted to be drawn, that Norma Kopp learned what had happened here, learned the thing she told us on the witness stand that Cramer told her, from the newspaper. Did you notice that Norma Kopp says Thiel, or rather Cramer, told her that Thiel had told him that he and the others with him were going to take their directions, get their instructions from a "sitz" in the Bronx; "hideout" she translates it. I say to you you can take that New York Times newspaper; it is the only one in evidence, and read that every word that is printed in that paper on this saboteur scheme, and you won't find that particular detail mentioned anywhere, not anywhere in that entire account.

Now coming back to the narrative review of the evidence. Cramer took the money belt home and there concealed it in the shoe box; and I say "concealed it," and I will have something to say on that. The next evening he counted it and he made the memo which is in evidence, the memorandum which was shown to you this morning. Notice Cramer says he made that memorandum for Thiel's protection, and note that it indicates not only the amount of money there and the amount that Cramer felt
855 was owing to him; it indicates as well the number of gold notes, of gold certificates included in that batch. Cramer knew that Thiel was risking immediate detection the moment he tried to pass one of those gold notes, and Cramer wanted to help Thiel by pointing out to him that there were gold notes there and how many there. Isn't that the perfectly clear import of what he did in respect of the memorandum?

The money counted, Cramer restored it to its place of concealment, the shoe box. And the next morning he again removed the money from the place and took it to the bank, except for a small amount which he says he kept around his apartment for Thiel's more immediate uses. Cramer hid the belt again at the bottom of the shoe box.

Notice there again how Cramer has varied his story. He started in and told the FBI, just what I have told you, that he put the money and the money belt in the shoe box, down at the bottom. And that when he counted the money he took it out of the belt, replaced it in the belt and again put it down in the shoe box. He hadn't thought at that time of this explanation about using the money belt for the purpose of shining his shoes. You heard Mr. Willis testify he never mentioned any such explanation to them, but again when this trial came along he thought of that ex-
856 planation, it seemed a good explanation, get away from any suspicion of hiding something; and what if it was inconsistent with his prior story? And as he has done so many times before he just abandoned the prior story to the extent that it was inconsistent, and he didn't think it important, or he didn't remember very well. He remembers better now, months after, than he did then, three days after.

As I said before, Cramer fell in with the plan completely. There is no better proof of that than his conduct during the remainder of this week of June 22nd. Remember how, Cramer's theory is that this was a casual, merely fortuitous meeting with an old friend. His interest in the matter was simply that Thiel owed him a couple of hundred dollars and he liked to see him. Now is that consistent with his conduct during these days of this week after

Thiel had been apprehended? Remember Cramer went downtown every night, Thursday night and Friday night, and what did he do downtown? He hung around Thompson's cafeteria and the Twin Oaks Inn and Bryant Park, and he went back there and peered in. He knew Thiel was staying at the Commodore Hotel. Thiel had told him that on June 22nd. If Thiel were really an old friend and he really meant that, why didn't he go in the hotel and ask for Thiel's room and leave a message for
857 him? No. It wasn't until Saturday morning, after he had been down two nights and wandered around and still had been unsuccessful in locating Thiel, that he finally got up the courage to leave a note which he says he laboriously drafted in his room, even to the extent of making a preliminary draft which you have seen and which read exactly, or almost exactly, as the final.

Now there has been some talk about consciousness of guilt. I say to you that conduct is as good evidence of consciousness of guilt as ever you will find. Now the chronology ends of course with the Saturday evening when Cramer was arrested at the Kolping House. Not even then did he relinquish his efforts to aid and comfort Thiel, to protect Thiel and to further the success of his mission by preventing its detection. Cramer's efforts to continue to aid and comfort Thiel form the basis of the tenth overt act set forth in the indictment.

A word about these overt acts. Counsel has stated, and the motion was made, and that is correct—you recall I stated to you on opening that we would prove the fact set forth in every one of those overt acts by good and sufficient legally admissible proofs, that we would prove at least one of the ten, and I think I said probably several, in the manner required by the Constitution, that is by two direct or two independent witnesses. Now we have proved, and our position is we have proven, three
858 of the acts in the technical manner required by the Constitution. They are the tenth, which is proved and established beyond peradventure of doubt by the testimony of Willis and Ostholtoff; the first and the second.

Now you recall the proof as to that first interview, the false statements that Cramer made, the statement that Thiel's name was "Bill Thomas", that Bill Thomas had been working in a factory on the West Coast from March, 1941 to June, 1942, that Thiel or Thomas had not been out of the United States since March, 1941, or since he knew him; that the money belt Cramer had received from Thiel contained only $200, which was money Thiel owed to him; that the $3,500 in the safe deposit box was Cramer's own money which he had obtained from the sale of his own securities. The proof has shown further that Cramer's statements were not to protect himself, for he admits he did not realize

until Ostholthoff told him that the FBI knew enough to seriously involve him. He was seriously involved.

So far as this draft charge is concerned, again the proof is shown that that is a more recent invention than this first meeting of Cramer's; Cramer did say to them in that interrogation, when they confronted him with the fact that Bill Thomas was really Werner Thiel. He said, "Well he is using the name Bill Thomas because of some draft charge," and then he went on to say, "But Thiel has not been out of the United States either, you see." The statement to the FBI that Thiel was using the name Bill Thomas because of some draft charge was part of the same fabrication of which the statement that Thiel had not been out of the United States was a part. And that is shown because you recall in the statement he signed the next day he says, "Thiel never told me why he was using the name Bill Thomas," because the next day he was not thinking of the draft charge. He was thinking what Thiel's real purpose was, and he did not want to admit that Thiel had told him why he was using that name.

Now since we need only one overt act that tenth one suffices. It has been proved in every way, in accordance with the Constitutional requirements. However, there are these other two. The first has to do with Cramer's meeting and conversing with Thiel, and Kerling, at the Twin Oaks Inn on June 25th; the second has to do with Cramer's meeting and conversing and conferring with Thiel during the remainder of the 'vening of that day at the Twin Oaks Inn and Thompson's cafeteria, and on the adjacent streets. In evaluating these two overt acts bear in mind what aid and comfort used in this statute mean. After all, this law is not a technical one traditionally, and this is the notion embodied in the terms of the law, traditionally when one nation—when a nation is at war and an enemy penetrates behind the battle lines and within the nation's borders, it is the theory of the treason law that the hand of every loyal citizen is raised against the enemy, that every door is shut to him, that he can find no rest or peace within the warring nation whose borders he has penetrated.

Now that simply and sensibly is the theory and the purpose of the treason statute, and it is in that light you can appraise acts to determine whether they really constitute aid and comfort. Remember, too, that in considering the acts of meeting, conferring, talking, conversing, even though or even assuming we did not know anything about the conversation, we are nevertheless entitled to have in mind what were the conditions under which it took place; what did the parties know about each other, who were the parties, where they had been and what had they

been through. Here were these two men who six or seven days before had landed from a submarine on the coast of Florida after a trip which must have been harrowing, strangers—or rather, alone in an enemy country.

861 Here was Cramer, a man who, as the proof will show, was trusted by them, was their confidant. I say to you it was certainly aid and comfort to them in every genuine sense and real sense of that term, even to be able to sit down with a trusted friend, a confidant, and talk about inconsequentials, or the weather, or anything else. Now so much for the Government's evidence.

Let us turn now for a moment to the defendant's acts. Basically, as has been stated, it comes down to the single issue of intent. What he said, I take it, is that Cramer did all these things but that he did them without the knowledge that he was treating with enemies or that he was rendering them aid and com[illegible]t, and, by consequence, that he had no intent.

Now of course there is specific proof in this case of Cramer's knowledge that he was treating with enemy agents, and that proof is uncontradicted except for Cramer's contradiction, and I think you can evaluate that at its true worth. But apart from the specific proof, the undisputed evidence as to what was done here is such that from it alone the only conclusion that they can logically follow is that Cramer knew these men to be enemy agents and that he was told by them that they were such.

862 Look at that a moment. Isn't it inconceivable that Cramer did not know these men were enemy agents? Consider the facts. Here he meets in Grand Central Terminal a man whom he knows to be a Nazi, a man he knows has just come from Germany. Put yourself in his place. And he says to this man, "You must have come by submarine," and according to his testimony Thiel turned and looked startled. And then Thiel tells him, "We were hunted on the trip over." Is it conceivable, is it reasonable, that Cramer did not know, even on the basis of what he already knew? Don't forget either the circumstances of his meeting with Thiel, the note slipped under the door, a strange handwriting, an unfamiliar voice calling his name in the hall, the rather cryptic terminology and references contained in the note. How could any man miss the clear implication of those facts? And I say to you on this issue of Cramer being a man of intelligence, you don't need a college education to know that when you meet a Nazi in Grand Central Station in time of war and he tells you he came off a submarine, that he is an enemy. I don't think you even need a great school education for that, much less Cramer, a student of Nietzsche and Ranke, the commentator on the political scene.

Truly, the evidence here has painted a picture of this defendant far different from the humble, hardworking laborer that
863 was depicted for us on the opening. What a contrast to that picture of the simple laborer is this man who throughout every examination on the facts of this case and the facts in his knowledge has sat back, as you have seen, constantly trying to out-maneuver the questioner, to predict the next move and to be prepared for it just as though he were playing a game of chess, and completely without regard to the relation of his statements to the truth.

Now again on this matter of knowledge, is it not an equally inescapable conclusion that Cramer was told, that is, that not only did he know from what he saw and what he heard, and what he admits seeing and hearing, that these men were enemies, but that he was told by them? Remember, Kerling and Thiel came to New York and sought Cramer out. Thiel not only spent all the time he could in Cramer's company, but he arranged apparently, and I think it is the only fair inference, for Cramer to meet his chief, Kerling, the head of that group. Clearly, Kerling and Thiel, over here as they were on this mission, were not interested in coming a thousand miles to have a beer or two with a casual acquaintance. Nor were they interested in meeting and discussing such delicate topics as the manner in which they arrived here with people for no purpose other than conversation.

Isn't it inescapable that they had a purpose in contacting
864 Cramer and that as a part of their purpose they must have told him? Forgetting all the other evidence which indicates that they did, for the moment.

Now Cramer is an intelligent man. He showed on the witness stand that he realizes full well the force of that argument; he realizes that the very facts, the things he did, the things he heard and saw, are such that they are completely inconsistent with any statements by him that he didn't know, had no suspicion that these men were enemies. So what he does is this: through a maze of tortuous evasions he finally arrives at the decision that he thought, he believes, or he had a hunch that these men were enemies but that he suspended judgment and he did not think any more about it. Why? Because Thiel had said, "I will tell you more about it later," or "I will tell you all about it later."

I say to you gentlemen a man may not in reason and in logic say "My eyes are open, all the evidence is before them but I do not see."

Of course corroborating the inevitable conclusion are the facts themselves. We have the specific evidence or the proof, rather, of Cramer's specific admissions that he was told by Thiel that he

was here on a mission for the German government. Now we have Kopp's testimony, and I mentioned that. Cramer
865 told her that Thiel was here and that he was here on a mission for the German government; and Kopp's testimony, although it has been assailed and I do not propose to spend any time on that, you have heard her testify, you know what her demeanor was, and I am willing to accept your judgment as to whether or not she was frank. Kopp's testimony is corroborated and it is corroborated by Ostholthoff.

Now I want to say a word about that because it seemed to me that what happened here this morning or, rather, this afternoon, was that Ostholthoff was politely called a liar, very politely, but none the less a liar. I do not see how Ostholthoff, an experienced FBI agent, could be mistaken on such an important matter. And that is particularly significant to me because you recall that Ostholthoff was not asked a single question on cross examination. Now he was here; he was offered for cross-examination. I say to you gentlemen if there is any question about what he testified to, why wasn't he examined on it? Why wasn't he asked a single question? And you saw an effort this morning to use Willis's cross examination, as it so seemed, to impeach Ostholthoff. There was ample opportunity to cross-examine Ostholthoff, and he was not asked a single question.

Now that is the specific proof of Cramer's intent, for to
866 member, if a man gives aid and comfort to people he knows are enemies, knowing they are enemies, he commits the crime of treason. That is intent. In other words he cannot disclaim intending to do what he knowingly did.

Now you have other proof, however, which has a bearing on intent, and this is the last line of the proof upon which I shall comment, and that is the proof of motive.

Understand, motive cannot change intent but it may be probative of intent or, in this case, corroborative of intent. Now thus, here, if Cramer were an otherwise completely loyal citizen who consorted with Thiel and Kerling in this manner, knowing they were enemies for the reason and motive of friendship only, he would nevertheless be guilty for he would have intentionally given aid and comfort, and his motive is immaterial once intent is established. However, here the proof goes further and shows that not only did Cramer knowingly give aid and comfort to Thiel and Kerling, but that he had a motive for wishing to advance in every way the success of their mission. This motive of Cramer's is abundantly shown by the evidence of his own writings.

Now on the writings I want to say this further word. Chiefly

we are dealing with three letters here, two letters in 1941, November 25th and December 3rd, and the letter of April 1942. Did you notice this morning how on the discussion of motives the
867 April 1942 letter was discussed at one time and then after considerable intervals discussion on other topics, the two letters of 1941 were discussed, and the point was made, well, you can't convict a man for feeling this way before Pearl Harbor. Of course you can't, and of course we do not contend that you can. But we do say and have said throughout this trial, the motive is relevant to his state of mind and that these letters show his state of mind not only at the time they were written in 1941 but in conjunction with the letter of April 1942, the letter where he says he does not want to be misused by the American Army as a world conqueror; that in conjunction with that they show a continuing state of mind which never changed or varied from November 1941 to April 1942, and right through down to June.

Now in that connection you recall counsel read to you from an opinion of Judge Mayer's, in a case in this court, and I am going to read to you a very brief part that occurs below and after, separated by some detail, what counsel read to you. The Judge said:

"What I am endeavoring to do is to make clear that all of these events that preceded our declaration of war, viewed in their worst possible light, do not in any manner charge the defendant with
868 any crime with which he may be here convicted, but that those events must be carried in mind in order that you may determine what on April 6th was the knowledge of Frieke as to Kolliger, and what was his intent after that in giving this money" etc.

I say to you that is exactly the connection in which we have presented this evidence, in order that you may determine from it what Cramer's knowledge and what was his intent in June 1942 when he had these dealings with these saboteurs which are the basis of this indictment. And, by the way, on that picture of Cramer as a pacifist, Cramer who did not want to be misused by the American Army as a world conqueror because he was a pacifist, well that might be all right if that letter stood alone. You see the danger of taking one part and forgetting about the others. If that letter stood alone it would make perfect sense, but it does not stand alone, and we know Cramer was no pacifist because we have his letter in 1941, in November or December. I do not at the moment know which one it was, but the one letter in which he says "I am living here much too pleasantly in view of the gigantic sacrifices which the glorious German army is making day by day for the homeland." Are those the words of a paci-

fist? He was a pacifist in one direction only, and that was so far as serving in the United States Army was concerned. And
869 you noticed Cramer conceded on his cross-examination here this morning that that business about world conqueror is the Axis propaganda line.

Now, gentlemen, that in sum is the Government's case. As I told you in opening and in this discussion of facts, I remind you again in closing, this crime must not be measured by its unsuccess. No failure or omission or lack of will or effort on the part of this defendant Anthony Cramer occasioned the defeat of this desperate venture. Unless we are to reward traitors for the vigilance and effectiveness of the Federal Bureau of Investigation in tracking them down and bringing them to book, we must appraise the gravity of this offense from the standpoint of the successful completion by these saboteurs of their mission. We are entitled to have in mind what that would entail not only in terms of crippling our war effort by the destruction of vital industries, but in terms, as well, of loss of life and injury to war workers. No other appraisal of the importance of the offense is meaningful. Have in mind, too, that there is no guarantee while this war endures against a repetition of just what was attempted here, nor indeed is there any guarantee I know of that it has not already been repeated. This much we can be sure of,
870 that whenever and wherever on our shores or in our country such an attempt has been or is to be made again, it will be conceived and executed to depend for its success upon the Cramers and upon the assistance and cooperation, the aid and comfort to be rendered by just such persons as this defendant here. I fear that the High Command and the German Government know all too well who are the Cramers among our population. They know who are the disaffected individuals, men like this defendant, who have assumed the cloak of citizenship, availed themselves of all the benefits and privileges and protection which citizenship confers only to betray their sacred trust at the moment when their adopted country most needs the allegiance they have so solemnly sworn.

Cramer has had all the benefits of his citizenship, and among them this most recent one of a fair trial in the American manner before a just and impartial jury. His guilt has been demonstrated here by an overwhelming mass of competent, legally sufficient and legally admissible proof. Our responsibility in the case is ended. It now rests with you to say by your verdict whether this defendant is to be stamped a traitor, which he has been shown to be. I commend this case to you for your consideration with the utmost confidence in your verdict.

The COURT (GODDARD, J.). First I want to take this opportunity to express to Mr. Medina, Mr. Minton, and Mr. Jordan the very sincere thanks of the Court for having accepted the assignment by the Court to represent this defendant. You have faithfully and ably served this defendant.

Mr. MEDINA. May it please your Honor, I have a most distressing and disagreeable task and that is to object to the fact that you have mentioned that to this jury, and to take exception to your Honor's comment. It is something I do with the most extreme regret, but I honestly feel that my duty requires that I do it. I do not think the jury should have been told that. I have tried to keep it from them myself, and I have not mentioned it.

The COURT. I do not think any harm has been done.

Mr. Foreman, and members of the jury: The defendant, Anthony Cramer, has been indicted by the grand jury for the offense of treason, in violation of Section 1 of our Criminal Code. Now in considering the case it is necessary to keep in mind the
872 elements of treason, so I will read Section 1 to you, although you have heard it read perhaps several times. It reads as follows:

"Treason. Whoever owing allegiance to the United States levies war against them or adheres to their names, giving them aid and comfort within the United States or elsewhere, is guilty of treason."

The indictment charges that the defendant Cramer, owing allegiance to this country, did adhere to the enemies of the United States, namely the government of the German Reich, and its representatives with which this country was then at war, and committed certain overt acts.

There were ten overt acts alleged in the indictment, but seven of them have been dismissed or withdrawn because there were not two witnesses to each overt act. And so there now remain three overt acts, 1, 2 and 10; and I will read those to you.

The grand jury charges the first overt act as follows:

"That Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this court, did meet with Werner Thiel and
Edward John Kerling, enemies of the United States, at the
873 Twin Oaks Inn at Lexington Avenue and 44th Street, in the City and State of New York, and did confer, treat and counsel with said Werner Thiel and Edward John Kerling for a period of time for the purpose of giving and with intent

to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling."

The second overt act is as follows:

"Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did accompany, confer, treat and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues".

The tenth overt act reads as follows:

"Anthony Cramer, the defendant herein, on or about June 27, 1942, * * * did give false information and make false statements regarding Werner Thiel, an enemy of the United States, to officers and agents of the United States, to wit, John G. Willis and A. E. Ostholthoff, Special Agents of the Federal Bu-
874 reau of Investigation, Department of Justice, then and there engaged for and on behalf of the United States in investigating said Werner Thiel and his activities in the United States, said false information and false statements being in substance as follows, to wit, (1) That Werner Thiel's name was Bill Thomas; (2) That from March 1941, until June 1942, Werner Thiel had been working in a factory on the West Coast of the United States; (3) That during the aforesaid period, Werner Thiel had not been out of the United States; (4) That the money belt given him by Werner Thiel in June 1942 had contained only a couple of hundred dollars which Werner Thiel had owed him; (5) That $3,500 in his safe deposit box at the Corn Exchange Bank Trust Company, belonged to him and to no one else, had been obtained by him from the sale of his securities, and was kept by him in a safe deposit box because he considered it safer there than in his savings bank account; the aforesaid false information and false statements being given and made for the purpose of concealing the identity and mission of said enemy, Werner Thiel, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel."

875 Now this statute which the defendant is accused of violating is an ancient one and its enforcement is of vital importance to the entire nation. Congress makes the laws, but many of our laws depend for their enforcement upon the jurors to whom the facts are presented in each particular case.

Of course you have heard—I do not believe anybody here on this jury needs to be reminded of it, but I want to make sure of it—that under our law an indictment is not proof of guilt; it is an accusation. And everyone is presumed to be innocent until that presumption is replaced by proof of guilt beyond a reason-

able doubt, and that includes proof beyond a reasonable doubt of every element of the crime.

Unless you are satisfied beyond a reasonable doubt that the defendant's intention was to aid Thiel and Kerling, or either of them, as enemies of the United States and agents of the German Reich, the defendant must be acquitted.

Reasonable doubt does not mean a possible doubt or a fanciful doubt, but it means a doubt which is reasonable in view of the evidence or lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the testimony. Now if, after a careful consideration of the testimony you are convinced of the defendant's guilt, and such conclusion is one in which you would be willing yourselves to rely and act upon in the more important matters of your own private life, then it may be said that you have no reasonable doubt.

You have given, I am convinced, very careful consideration to the testimony and to the various witnesses as they appeared on the stand. You have observed their demeanor, their manner of testifying and their general character. You have heard the testimony, and you have heard it discussed at great length by counsel, and I shall not attempt to repeat it. It is for you and you alone to say what the facts in the case are.

The testimony of Burger and the testimony of the witnesses describing the events which took place in Germany and the lading of Kerling and Thiel in the United States, and what took place on Long Island and Florida, was received solely for the purpose of proving that Thiel and Kerling were enemies, and is not to be considered by you except on the question as to whether or not Thiel and Kerling were enemies, for that is a fact which the Government had to establish.

There are a good many letters and documents, and they will be made available to you later. If I, or counsel in referring to any testimony in the case, have stated testimony, and their recollection or mine differs from your recollection of the testimony, you are to follow your recollection because, as I have said, you are the sole judges of the facts.

If you find that a witness has made a misstatement with the intention of misleading you, you may disregard not only that part of the witness's testimony, but so much of that witness's testimony as you do not believe. In other words, you may reject all of the witness's testimony if you find it unreliable, or you may accept part of it if you think it is reliable. Interest in the outcome of a case may create a motive for false testimony, and quite naturally the greater the interest the stronger the motive and the temptation to falsify. A defendant has a great interest in the outcome of a trial. But of course this does not mean that a de-

fendant will not or has not testified to the absolute truth. It only means that a jury should take into consideration this fact in weighing the testimony. And, I repeat, you are the ones to decide upon the credibility of a witness.

All citizens of the United States, whether born here or citizens by naturalization, owe a duty of allegiance to the United States, and they continue to owe this duty of allegiance, even
878 though they may have been born in another country with which this country is at war.

The uncontradicted proof is that Cramer was naturalized in 1936. On the breaking out of war between two nations, the citizens and subjects of the respective belligerents are deemed by the law to be the enemies of each other. Hence, when the United States is at war the term "enemy of the United States" applies to any of the subjects of the foreign power with which the United States is at war. Thus, at the present time and throughout June 1942, the time applicable to this case, all of the citizens and subjects of Germany were enemies of the United States, and of course all members of the German military or naval forces, and all agents and spies working on behalf of Germany, were enemies of the United States.

When war exists, any act which by fair construction is directed in furtherance of the hostile designs of the enemies of the United States and gives them aid and *and* comfort, or if that is the natural effect of the act, is an overt act of treason.

The words in the statute "adheres to their enemies, giving them aid and comfort" mean in general any act by one owing allegiance to the United States, clearly indicating a want of loyalty to that Government and sympathy with its enemies and
879 which, by a fair construction, is directly and intentionally in furtherance of their hostile designs.

Mere expressions of opinion indicative of sympathy with the enemy, though sufficient to create the suspicion that the one expressing such opinion is at heart a traitor, are not alone sufficient to justify a conviction of treason. But if you find that under the rules of law which I have or will advise you that the defendant has, with the intention of aiding the enemy, committed one or more of the overt acts charged, then you should find the defendant guilty.

Before convicting the defendant you must be satisfied beyond a reasonable doubt that the several acts done by him were reasonably calculated to further the hostile designs of the German Reich and not merely calculated to aid and assist Thiel and Kerling as individuals. And if you find that the acts testified to were committed solely out of friendship for Thiel and Kerling, or

either, and without any intent or purpose to assist them in their hostile purposes, the defendant should be acquitted.

If you find that either Edward Kerling or Werner Thiel was an agent or spy of the German government, in this country for the purpose of assisting the German government in the prosecution of its war, or in hampering the United States in the prosecution of its war against the German government, and that the defendant knew or believed, and with such knowledge or belief assisted or attempted to assist either of them in any way which might be useful in their mission to this country, then he was adhering to them and giving aid and comfort to the enemy.

It is necessary for the Government to prove that the person or persons aided and comforted by the defendant were enemies of the United States. It is also necessary for the Government to show that the defendant at the time he adhered to these enemies giving them aid and comfort, knew or believed that they were enemies.

A mere suspicion or conjecture that Kerling and Thiel were spies or agents of the German Reich, and thus enemies of the United States, is not sufficient to warrant a conviction.

It is not necessary for the Government to prove, although of course you may find that it so proved, that the defendant knew these persons were enemies, if it is shown that they actually were enemies and that the defendant believed them to be enemies.

It is not necessary for the defendant to have known any or all of the things which these alleged enemies intended to do, or any or all of the facts which the Government may offer in evidence in order to establish that they were in fact enemies.

It is only necessary that you find from the evidence that the defendant knew enough about them to believe that they were enemies.

Treason, of which this defendant is accused, can only be committed in time of war, so that statements made by the defendant before our declaration of war are not grounds for charging the defendant with treason. Prior to the entry into the war by the United States the defendant, as well as all others, had the right to his own opinion as to where his sympathies would be, and he had the right to express his opinions, and to do anything lawful in keeping with his opinions and sympathies, but those statements should be borne in mind by you, as they may help you to determine what his intent was after this country was at war with the German Reich, in committing the various overt acts charged, if you find that he committed them.

In order to commit the crime of treason, the defendant must be shown to have committed one or more overts acts in further

ance of a treasonable intent, and he must have entertained the treasonable intent at the time he committed the particular overt act.

The Constitution of the United States provides that no person shall be convicted of treasono unless on the testimony of
882 two witnesses to the same overt act. This means that the Government must prove at least one of the three overt acts charged in the indictment by the testimony of two witnesses. These witnesses must be direct witnesses to the overt act. Where the overt act is of a type which is separable into parts, that is, a continuance and composite act made up of several circumstances and passing through several stages, there must be two direct witnesses to each part of the act, but they need not be the same two witnesses who testified to other parts of the act, so long as each part of the overt act is supported by the testimony of two witnesses.

Proof of criminal intent and knowledge is sufficient if proved beyond a reasonable doubt, either by direct or substantial circumstantial proof. The two witnesses are not necessary for any facts to be proved, other than the overt acts.

Criminal intent and knowledge, being a mental state, are not susceptible of being proved by direct evidence, and therefore you must infer the nature of the defendant's intent and knowledge from all the circumstances. Circumstantial evidence is evidence which tends to prove a disputed fact, by proof of other facts and circumstances which have a legitimate tendency to lead the mind to conclusion that the fact exists which is sought to be established.

883 In considering the evidence you are entitled to and naturally will draw the reasonable inferences and conclusions from the evidence, whether it be direct statements of fact or circumstances. You may not have direct proof of a fact, but you may have circumstances from which you are able to draw reasonable conclusions and deductions.

Circumstantial evidence is entitled to as much consideration as you find it deserves, depending upon the inferences you think it necessary and reasonable to draw. The law makes no distinction between direct evidence of a fact and evidence of circumstances from which the existence of a fact may reasonably be deduced. Whether a fact is proved by circumstantial evidence or by direct proof is immaterial, for in either event it must be proved beyond a reasonable doubt.

The defendant's own conduct and words are the best index as to his intent, and you may infer from the defendant's conduct and words as shown in the evidence what his intent was.

Now at the request of the defendant I make the following charge:

In considering the evidence relating to the first and second overt acts alleged in the indictment, that is to say, the con-
884 versations on June 23rd in the Twin Oaks Inn and in Thompson's Cafeteria, there is no evidence other than the testimony of the defendant as to what was said in the conversations between the defendant and Thiel and Kerling, or either of them, and, unless the jury find that these conversations were reasonably calculated to aid and comfort Thiel and Kerling as enemies of the United States, such conversations were not in furtherance of the alleged treason.

In connection with this first and second overt act I want to advise you that the indictment charges that the first overt act committed by the defendant was that on or about June 23, 1942, he met with Thiel and Kerling, enemies of the United States, at the Twin Oaks Inn and did confer, treat, and counsel with them for a period of time for the purpose of giving, and with intent to give, aid and comfort to said enemies. As far as the defendant's criminal intent is concerned, that is, his intent to give aid and comfort to the enemy, that may be proved by circumstances, and the two witness rule does not apply.

It is necessary, however, with respect to this first overt act, and also with respect to the second overt act which is similar and which relates to the defendant accompanying and conferring with Thiel on June 23rd at the Twin Oaks Inn and at
885 Thompson's Cafeteria, for you to determine whether the fact that the defendant met and conferred with these persons as charged has been proved by two witnesses. If you find that it has been so proved, it is also necessary for you to determine whether Cramer's meeting and conferring with these persons in a public restaurant for a period of time would tend to encourage, advance, and further the hostile designs and interests of enemies of the United States. It is not necessary that the subject matter of the conversations in these restaurants be proved, because the indictment does not charge that the subject matter of the conversation is part of the over act. The indictment in effect charges that meeting and conferring with Thiel and Kerling in a public restaurant for a period of time, under the peculiar circumstances of this case, was an overt act of treason, regardless of the subject matter of the conversation, and that is not material to determine what the conversation was about.

In considering whether or not this is so, you may consider as bearing upon the nature of the act what was the relationship of the parties at the time the conversation and the meeting took

place, what had taken place before between them, and any other circumstances constituting the conditions under which the act took place. Thus, you may consider what, if anything,
886 Cramer knew about the other two men, what the other two men knew about Cramer, and what if anything had previously occurred between Cramer and Thiel which would tend to create between Cramer and Thiel any kind of relationship of mutual trust and confidence or otherwise, and whether such relationship, it is existed, gives significance to the act. Similarly, in considering the nature of the act, you may bear in mind, if you believe it to be a fact, that Cramer and Thiel had met and conversed on the previous night and made an appointment to meet on the night of the overt act.

At the request of the defendant I charge: If the jury finds that the defendant had no intention or purpose of assisting the German Reich in the prosecution of its war or in hampering the United States in the prosecution of its war against the German Reich at the time he did the several acts testified to, but did these acts solely for the purpose of assisting Kerling and Thiel, or either of them, as individuals, he must be acquitted.

Mr. MEDINA. Your Honor meant to say Kerling and Thiel there?

The COURT. Yes; I did.

Mr. MEDINA. That is to say, Kerling and Thiel, or either of them.

The COURT. Or either of them, as individuals.

887 With respect to the third overt act, No. 10, there is another of the defendant's request to charge: With respect to overt act No. 10, if the jury find that the defendant made false statements to the agent of the Department of Justice at the time of his apprehension for the purpose of concealing the name and whereabouts of Werner Thiel from the Selective Service authorities and not with the intent and purpose of rendering aid and comfort to Thiel as an enemy agent, knowing him to be such, such false statements do not constitute treasonable conduct.

Defendant's request No. 18: If the jury find that these false statements were prompted solely by the defendant's fear that he would be involved in some investigation by the Department of Justice and not made for the purpose of concealing Thiel's identity and whereabouts, knowing him to be an enemy agent, such false statements do not constitute treasonable conduct.

Now for the record I will state that I have charged the defendant's request 1, 3, 4, 5, 11. Requests Nos. 12, 13, 14, 15, 16 have fallen by the wayside as those overt acts to which they relate to have been withdrawn. I have charged requests Nos. 17 and 18.

Defendant's requests 2, 6, 7, 8, 9, 10 are denied, except as
888 covered in the main charge, with exceptions to the defendant.

Now gentlemen, motive should not be confused with intent. If the defendant knowingly gives aid and comfort to one who he knows or believes is an enemy, then he must be taken to intend the consequences of his own voluntary act, and the fact that his motive might not have been to aid the enemy is no defense. In other words, one cannot do an act which he knows will give aid and comfort to a person he knows to be an enemy of the United States, and then seek to disclaim criminal intent and knowledge by saying that one's motive was not to aid the enemy. So if you believe that the defendant performed acts which by their nature gave aid and comfort to the enemy, knowing or believing him to be an enemy, then you must find that he had criminal intent, since he intended to do the act forbidden by the law. The fact that you may believe that his motive in so doing was, for example, merely to help a friend, or possibly for financial gain, would not change the fact that he had a criminal intent.

On the other hand, proof of the defendant's motive may at times tend to shed light on his intent. For example, if you believe that the evidence shows that the defendant's motive and purpose was to help the German government and its representatives, then
that would tend to prove at least that he also had the
889 required criminal intend and knowledge. But, as I have already stated, if you believe that that was not his motive, that does not mean that he may not have had a criminal intent.

You should also bear in mind that it is impossible, and indeed it frequently happens, for persons to act for more motives than one. Thus, there would be no inconsistency in your believing, if you thought the evidence justified it, that the defendant had two motives in acting as he did, one to help the German government and its representatives, and another of a more personal character, to aid a friend.

In short, regardless of what his motive was, the question to be determined is whether the defendant believed that the person he aided was an enemy at the time, and knew that his acts would give aid and comfort to that enemy, and intended that they should.

The question of possible punishment of the defendant in the event of a conviction is not a matter for the jury to consider, and should not in any way enter into your deliverations. The duty of imposing sentence on a defendant convicted rests solely upon the Court, who tries to exercise it fairly and with due consideration as to the extent of a defendant's activities, as well as all other circumstances. The function of the jury is to weigh the

890 evidence and determine the guilt or the innocence of the defendant, solely upon the basis of the evidence.

If you find that the evidence respecting the defendant is as consistent with innocence as with guilt, the defendant should be acquitted. If you find that the law has not been violated by him you should not hesitate for any reason to render a verdict of acquittal. But, on the other hand, if you find that the defendant has violated the law as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty as a clear warning to all that treason may not be committed with impunity. Those who risk their lives in our Army and our Navy, the people of the United States, are entitled to be assured of this.

There is only one count in the indictment. I do not want you to confuse that with overt acts. I merely wish to advise you that when you render your verdict you state whether you find the defendant innocent or guilty.

Defendant's exceptions to charge

Mr. Medina. I respectfully except to that portion of your Honor's charge in which I understood you to say, with reference to the overt acts, of the meeting with Thiel or with Thiel and Kerling, that it was not necessary to know what the conversations were about.

I also except to your Honor's instruction with reference to
891 the two witnesses to the overt acts, it being my understanding that Your Honor charged that it was not necessary that there be two witnesses to each circumstance or each stage of the overt act.

The Court. I don't think I understood you clearly.

Mr. Medina. Your Honor will recall that I submitted a written memoranda indicating—and I do not know whether you think it proper for me to discuss this now—those authorities.

The Court. No; not discuss it; merely take your exception. I want to understand what you except to.

Mr. Medina. There are two views. I thought Your Honor in your charge, as I listened to it, accepted the view of one of those that I had thought was erroneous, and I want to state my objection to the way in which Your Honor charged that the two witness rule was applicable.

The Court. Yes; I think I understand you. You disagree with the statement of the Court that if the overt act is separable into parts, that is, a continuing and composite act made up of several circumstances and passing through several stages, there must be

two witnesses to each part of the act. That is the part you object to.

Mr. MEDINA. I do. That is precisely the part.

892 The COURT. I so charged, and you make have an exception.

Mr. MEDINA. Thank you.

The COURT. Now, gentlemen, you may retire, and the exhibits will be gotten together and sent in to you.

(The two alternate jurors were excused.)

(At 5:40 p. m., the jury retired to deliberate.)

(A note was sent by the jury to the Court at 6:15 p. m., the note reading as follows: "The jury requests a copy of the minutes of the entire trial.")

The COURT. That is received from the jury [handing note to Mr. Correa].

Mr. MEDINA. They request a copy of the minutes of the entire trial. What is Your Honor's pleasure?

The COURT. I will call them in and read such portions as they wish. I do not think it is advisable to give them the minutes. Bring in the jury.

(The jury returned to the jury box at 6:17 p. m.)

The COURT. Mr. Foreman, I have this request from the jury, which reads as follows: "The jury requests a copy of the minutes of the entire trial." It is not permissible to send in the minutes to the jury, but any portion that you wish to have read will be read.

893 The FOREMAN. Well, that is what we had in mind, Your Honor. We wanted to go over Norma Kopp's testimony.

The COURT. Then you would like to have Norma Kopp's testimony read; is that it?

The FOREMAN. Yes, Your Honor.

The COURT. That will serve your purpose?

The FOREMAN. Yes.

The COURT. Mr. Reporter, will you read that testimony, please.

(Record read, beginning at page 338 with the direct examination of Emma Kopp, down to page 344, to the following:

"Mr. CORREA. The question is, if Your Honor please, as to the conversation"——)

The FOREMAN. That is all we want to hear, just down to there.

(The jury retired to continued its deliberation.)

(At 7:55 p. m. the jury returned to the courtroom.)

The CLERK. Members of the jury, please answer to your names? (Roll called.) Mr. Foreman and members of the jury, have you agreed upon a verdict?

The FOREMAN. Yes; we have.

The CLERK. How say you?

Verdict

The FOREMAN. We, the jury, find the defendant guilty as charged.

894 The CLERK. Members of the jury, listen to your verdict as it stands recorded in this issue joined, the United States against Anthony Cramer. You say you find the defendant guilty, and so say you all.

Mr. MEDINA. May the jury be polled, Your Honor?

(The jury was polled.)

Motion to set aside verdict and for a new trial

Mr. MEDINA. If Your Honor please, I move to set aside the verdict, and for a new trial, upon the ground that the verdict is contrary to the law on the facts, and without limiting the generality of the foregoing, on the ground that the following rulings by the Court in the course of the trial were erroneous and highly prejudicial to the defendant:

First, the admission into admission over defendant's objection of Government's Exhibit 55, being the copy of the Constitution of the United States from the issue of the New York Times of September 17, 1937, page 21;

Second, upon the admission into evidence over defendant's objection of the testimony of the witness Paul Powers, the minute man who testified as to the alleged refusal of the defendant to purchase United States War Bonds;

895 Third, upon the overruling by the Court of the defendant's objection to the question put to the defendant on cross-examination concerning statements made by the defendant's nephew Norbert in a letter written to the defendant by the said Norbert.

Fourth, upon the admission into evidence over defendant's objection of photographs of various explosives, caps, shells, and other materials allegedly brought to this country by the eight saboteurs who were tried by the military court in Washington, following the concession by the defendant that Werner Thiel and Edward John Kerling were enemy agents engaged on a mission of sabotage to this country.

Denial of motion to set aside verdict and for a new trial

The COURT. The motion is denied, Mr. Medina. I think the verdict is fully justified by the facts and by the law.

Mr. MEDINA. May I note an exception to Your Honor's denial of my motion.

The COURT. Yes, sir.

Mr. MEDINA. Thank you.

The COURT. Gentlemen of the jury, you are discharged with the sincere thanks of the Court.

(The jury left the courtroom.)

Mr. CORREA. If the Court please, on the matter of sentencing, the Government requests that sentence be set down, my suggestion would be, a week from today.

896 The COURT. Yes; that is what I had in mind, a week from today.

Mr. CORREA. And the defendant be remanded meanwhile.

The COURT. Yes.

Mr. CORREA. He is already in custody.

Mr. MEDINA. That is at 10:30 a week from today?

The COURT. Yes, Mr. Medina.

Mr. MEDINA. Thank you.

The COURT. That would be November 25th. Now let me see about the room. I am not sure it will be in this room.

Mr. CORREA. I would suggest, your Honor, that we set it provisionally for this room, and if it is not available we will undertake to notify counsel where it will be.

The COURT. I will set it down for November 25th at 10:30 in this room. Meanwhile the defendant is remanded.

[Title omitted.]

897 NEW YORK, *December 2, 1942;*
10:30 o'clock, a. m.

Sentence

The CLERK. In the matter of Anthony Cramer, for sentence. Are you ready, gentlemen?

Mr. MEDINA. Ready.

Mr. CORREA. The Government is ready, if your Honor please.

Mr. MEDINA. May it please your Honor, I do not know whether you feel that it is appropriate to have anything said at this time, but I should like to address you very briefly if you think it proper that I should do so.

The COURT. It is quite proper, Mr. Medina.

Mr. MEDINA. Now of course I realize that with the care your Honor followed the trial and with your Honor's disposition to consider every angle of all situations before you, I may take it for granted that every argument that may be presented here, both on the Government's side and on behalf of Mr. Cramer, has been given due consideration by your Honor, and I do assume that.

And I assume also that your Honor has studied with care
898 the memorandum which we submitted. I only wish to do this one thing, and that is to remind your Honor of a phrase in Your Honor's instructions to the jury which left a very lasting

impression upon me. That was when you told them that they had no part in the punishment to be imposed, that that was something that rested in your Honor's discretion. And then you added that they might assume that you would exercise that discretion with due consideration for the extent of the defendant's activities and all other circumstances, and I think really that I may with confidence submit to your Honor that the circumstances here warrant your Honor exercising a merciful consideration towards this defendant's situation, and I beg of your Honor to do that. Thank you.

Mr. CORREA. May I be heard, if your Honor please?

The COURT. Yes, Mr. Correa.

Mr. CORREA. If Your Honor please, it is the practice of our court for the Government to make a recommendation on sentence. That is not always a pleasant duty. I should say in a case of this importance that a case where the maximum sentence which may be imposed is as serious as here I feel, nevertheless, it is the duty of the United States attorney to make a recommendation to the Court, while recognizing the responsibility for sentence is primarily that of the Court. Accordingly we have given
899 most serious consideration to the problem and our recommendation upon this sentence.

Of course the importance of the matter cannot be exaggerated. I think the evidence adduced at the trial demonstrates that beyond any need of argument of the fact to your Honor. Here in time of war we are faced with evidence of what was tantamount, as we called it, I believe, at one point during the trial, to a secret armed invasion of the United States; and I think even more appalling, again as I have stated in the trial, is the fact which is shown by this evidence that in carrying out this desperate plan reliance was placed upon the cooperation, the aid, and assistance of disaffected loyal persons over here, including—and this is to me the most appalling aspect of the case—persons who had sworn loyalty to this country and been given the high privilege of citizenship in our country.

Your Honor will recall that that was the inference from the evidence which we argued to the jury and urged throughout the trial. It has since appeared in another case from the testimony of the same witness who has testified in the Cramer case further that that is the fact—that is, that certain of these eight saboteurs who came over here were instructed to communicate with particular individuals over here and did so communicate with them.

900 As far as the defendant Cramer's participation in what was done here is concerned, of course we have this—that the plan even as to the eight saboteurs was nipped in the bud.

And that was true not only as to their plans, but true as well of the participation of such persons as this defendant Cramer. That, as I have had occasion to say before and on every occasion, redounds everlastingly to the credit of the Federal Bureau of Investigation. We nipped this plot aborning as it were and saved our country incalculable damage. But the fact remains that while the matter flourished Cramer did all he could. The evidence has dispelled any suggestion that Cramer's participation in this thing was casual or due to some fortuitous meeting with an old friend. I have in mind particularly the fact not only of his secretion of the money belt and the money and all of that, but the fact that he apparently planned to continue with Thiel. After Thiel was apprehended he came down night after night looking for Thiel and trying to reestablish the contact with him which had been broken by Thiel's arrest.

The point has been made in the memorandum which has been submitted by counsel for the defendant Cramer that Cramer did not have the traitorous and treasonable mind and motive
901 that is a requisite to the worst type of the crime of treason, and that what he did he did actuated by friendship for Werner Thiel. Again it seems to us that the evidence does not support that theory; that the evidence of Cramer's own writings indicate that he did have a disloyal mind as far as this country is concerned and as far as its war effort is concerned, and that his prime loyalty at all times, although he owed allegiance to this country, was to our enemy Germany.

Now the problem of sentence in this case, if your Honor please, is not one it seems to me of punishment alone. All-important in any consideration of the sentence to be imposed here, in our view, is the deterrent effect which that sentence will have. We are still in war. We cannot fool ourselves that these attempts will not be repeated. We have no assurance even that they have not been. We know this—that whenever and wherever they have been or are to be repeated they are going to depend for their success upon just such persons as this defendant here. In the nature of things they must. The Federal Bureau of Investigation does its job well, and has done its job exceedingly well in this case. Our other agencies engaged in law enforcement and in the apprehension of this kind of malfactor have done well. But all of their work is set at naught unless all persons who are in a similar position to the position in which this defendant was at the
902 time he was first approached on this matter, are made to realize that swift and certain retribution will follow any engagement by them in this kind of activity. And our experience has shown as well—and when I say our experience I cite not only our experience, the experience of our office, but the experience as

well of the Federal Bureau of Investigation as it has been told to me by its responsible officers—that a prison term does not act as a deterrent to persons of this mind and character. That is due partly I suppose to the fanaticism with which they cling to the new order, or however you may characterize the basic principle and philosophy of our enemies. It is due partly to the fact that the belief exists among such persons that any prison term, no matter what its duration, really means imprisonment for the duration of the war.

Now if this is true, and it is established by the experience of the investigative agencies and law enforcement agencies which it seems to me is not controvertible, it follows that the only penalty which will perform the function and office of helping safeguard against a repetition of this offense at other times throughout this war is the extreme penalty provided by the statute in this case.

I know it is a favorite theme of our enemies and
903 their propagandists that democracies are soft and incapable of dealing with ruthless aggression. As a matter of fact it is just that preachment which they use to encourage such of their failures as these in acts of this kind. If they mean by "soft" that the democracies, this democracy at least, is unwilling to take men out and shoot them without the semblance of a trial, I readily agree we are soft; and I think this case illustrates it well, for this man certainly had every benefit of a fair and impartial trial and the benefit of able counsel to defend him throughout that trial. On the other hand if it is meant we are soft in the sense of being unable to mete out adequate punishment for crimes of this kind, it seems to me our very national existence depends on our ability to repudiate that charge. Here I feel punishment by the extreme penalty provided by the statute is adequate. At a time like this, when this country is asking millions of its men to risk their lives and not a few of them to give their lives, and they are doing it cheerfully, it seems to me neither injustice nor undue severity to ask that one who has betrayed that country pay with his life—and this not as a matter of vengeance or punishment, but simply and solely to send the stern warning to all who may be similarly tempted that if they have anything to do with an enemy agent they take their lives in their own hands.

904 If your Honor please, the Government recommends the defendant be sentenced to death.

The COURT. I hardly need assure you, Mr. Correa, and Mr. Medina, I have given very earnest consideration to the proper sentence in this case. I shall not impose the maximum penalty of death. It does not appear that this defendant Cramer was aware that Thiel and Kerling were in possession of explosives or

other means for destroying factories and property in the United States, or planned to do that.

From the evidence it appears that Cramer had no more guilty knowledge of any subversive purposes on the part of Thiel or Kerling than a vague idea that they came here for the purpose of organizing pro-German propaganda and agitation. If there were any proof that they had confided in him what their real purposes were, or that he knew or believed what they really were, I should not hesitate to impose the death penalty.

The sentence of the defendant Cramer is that he be committed for a term of imprisonment of 45 years, which at Cramer's age is substantially equivalent to a sentence for life; and sentenced to pay a fine of $10,000; and he is remitted to the custody of the Attorney-General of the United States or his authorized representative who shall designate the place or places where the sentence shall be served. Defendant to stand committed until the fine is paid.

905 *Requests to charge on behalf of defendant*

1. Unless the jury are satisfied beyond a reasonable doubt that it was the defendant's intention and purpose to aid and comfort Werner Thiel and Edward Kerling, or either of them, as enemies of the United States and agents of the German Reich, the defendant must be acquitted.

2. Unless the jury are satisfied beyond a reasonable doubt that the defendant Cramer knew that Kerling and Thiel, or either of them, was an agent or a spy of the German Reich at the time he did the several acts testified to and that he did the several acts for the purpose and with the intent of assisting the German Reich in the prosecution of its war or in hampering the United States in the prosecution of its war against the German Reich, the defendant must be acquitted.

3. If the jury find that the defendant had no intention or purpose of assisting the German Reich in the prosecution of its war or in hampering the United States in the prosecution of its war against the German Reich at the time he did the several acts testified to but did these acts solely for the purpose of assisting Kerling and Thiel, or either of them, as individuals, he must be acquitted.

4. The jury must be satisfied beyond a reasonable doubt that the several acts done by the defendant were reasonably calculated to further the hostile designs of the German Reich and not merely calculated to aid and assist Kerling or Thiel as individuals.

906 5. If the jury find that the defendant committed the acts testified to here out of friendship for Werner Thiel and

Edward Kerling, or either of them, and without any intent or purpose to assist them in their hostile purposes, he must be acquitted.

6. The several acts of the defendant must have been committed with an actual knowledge of the fact that Kerling and Thiel, or either of them, were in facts agents and spies of the German Reich. A mere suspicion or conjecture that they might have been spies or agents of the German Reich and thus enemies of the United States is not sufficient to warrant a conviction.

7. In order to convict the defendant the jury must find that the defendant's acts and conduct were the result, not of negligence or thoughtlessness, but were inspired by a definite intent and purpose to assist Thiel and Kerling, or either of them, in the prosecution of their mission to this country.

8. This defendant is accused of treason. Treason can only be committed in time of war. Prior to our entry into this war this defendant, as well as every other man, as a matter of law, had a right to his own opinion as to where his sympathies would be and he had a right to do anything lawful in that connection and whatever sympathies he may have had for Germany prior to this country's entry into the war should not be considered by the jury as any evidence of treasonable intent.

907 9. Letters or statements made by the defendant before this country's entry into the war, insofar as they may have indicated sympathy or preference for Germany or any criticism of this country's policy with respect to the war, were, as a matter of law, entirely lawful and proper and the jury should not consider such letters or statements as any evidence of treasonable intent.

10. In order to commit the crime of treason the defendant must be shown to have committed overt acts in furtherance of a treasonable intent and he must have entertained the treasonable intent at the time he committed the particular overt act. Each overt act must be proven by the testimony of at least two direct witnesses to the whole overt act.

11. In considering the evidence relating to the first and second overt act alleged in the indictment, that is to say, the conversations on June 23rd in the Twin Oaks Inn and in Thompson's Cafeteria, there is no evidence other than the testimony of the defendant as to what was said in the conversations between the defendant and Thiel and Kerling or either of them; and, unless the jury find that these conversations were reasonably calculated to aid and comfort Thiel and Kerling as enemies of the United States, such conversations were not in furtherance of the alleged treason.

12. With respect to the third overt act, alleging possession and concealment for safekeeping of a money belt belonging to Thiel, unless the jury are satisfied that such possession or concealment was knowingly carried out with the intention of promoting the hostile conduct of Thiel and not merely because of friend-
908 ship or because he thought he might thereby more readily secure the payment of the indebtedness which Thiel owed him, then and in that event such overt act was not in furtherance of the alleged treason.

13. With respect to the fourth overt act, alleging possession and concealment for safekeeping of $160 belonging to Thiel, unless the jury are satisfied that such possession or concealment was knowingly carried out with the intention of promoting the hostile conduct of Thiel and not merely because of friendship or because he thought he might thereby more readily secure the payment of the indebtedness which Thiel owed him, then and in that event such overt act was not in furtherance of the alleged treason.

14. With respect to the fifth overt act, namely, the writing of a letter to Norma Kopp, if this letter was written for the purpose of procuring a contact between Thiel and Norma Kopp solely for social or romantic purposes and not for the purpose of aiding and assisting Thiel in the commission of any hostile acts against the Government of the United States, such overt act was not done in furtherance of the alleged treason.

(15. With respect to the sixth and seventh overt act, a charge is requested similar to that requested in the case of overt act No. 3.)

(16. With respect to overt act Nos. 8 and 9, a charge similar to that requested with respect to the fifth overt act is respectfully requested.)

909 17. With respect to overt act No. 10, if the jury find that the defendant made false statements to the agents of the Department of Justice at the time of his apprehension for the purpose of concealing the name and whereabouts of Werner Thiel from the Selective Service authorities and not with the intent and purpose of rendering aid and comfort to Thiel as an enemy agent, knowing him to be such, such false statements do not constitute treasonable conduct.

18. If the jury find that these false statements were prompted solely by the defendant's fear that he would be involved in some investigation by the Department of Justice and not made for the purpose of concealing Thiel's identity and whereabouts, knowing

him to be an enemy agent, such false statements do not constitute treasonable conduct.

(See: *United States v. Fricke*, 259 Fed. 673; *United States v. Robinson*, 259 Fed. 685.)

909-a [Clerk's certificate to foregoing statement of evidence omitted in printing.]

910 In United States District Court

[Title omitted.]

Order settling bill of exceptions and filing record.

March 22, 1943

Upon the annexed stipulation of the United States District Attorney and the attorneys for the defendant, it is

Ordered that the defendant's bill of exceptions, consisting of a typewritten set of the minutes of the proceedings in the Southern District Court, typewritten copies of the statement under Rule 13, notice of appeal, Clerk's list of exhibits, Clerk's certificate, all necessary orders, assignment of errors, the indictment and a stipulation dispensing with the printing of exhibits be, and the same hereby is, settled and allowed and that said papers may be filed for use by the Clerk of this court in certifying a record on appeal.

Dated: New York, March 22, 1943.

HENRY W. GODDARD,
United States District Judge.

911 In United States District Court

[Title omitted.]

Stipulation as to record on appeal.

March 19, 1943

It is hereby stipulated by and between the United States District Attorney and the attorneys for the defendant that, the annexed set of stenographer's minutes, consisting of three volumes, is a true and correct transcript of the proceedings of the Southern District Court in the above-entitled cause and that said minutes, together with typewritten copies of the statement under Rule 13, notice of appeal, Clerk's list of exhibits, Clerk's certificate, all necessary orders, assignment of errors, indictment and a stipulation dispensing with the printing of exhibits may be filed with the

Clerk of the Southern District Court pursuant to the annexed order of Hon. Henry W. Goddard.

Dated: March 19th, 1943.

MATHIAS F. CORREA,
United States District Attorney.

HAROLD R. MEDINA,
Attorney for Defendant.

JOHN McKAIN MINTON, Jr.,
Attorney for Defendant.

912 [File endorsement omitted.]

913 In United States District Court

[Title omitted.]

List of Exhibits.

Filed March 22, 1943

GOVERNMENT'S

No. of Exhibit	
1 and 2	Naturalization records from District Court, Northern District of Indiana.
3 to 10 inc.	Photographs of eight saboteurs.
11 to 27 inc.	Photographs of explosives, fuses, and other materials in the possession of the saboteurs.
28a	Photograph of four overseas caps.
29a	Photograph of a cap.
30	A shovel.
31a and 32a	Photographs of shovels in possession of saboteurs.
33a	Photograph of Burger's money belt.
35	Kerling's money belt.
36	Photostat of outward bound manifest, Bureau of Immigration, July 11th, 1940.
37	Photostat of incoming manifest, Bureau of Immigration, July 27th, 1925.
38	Photostat outward bound manifest, Bureau of Immigration, June 14th, 1936.
39	Incoming manifest, Bureau of Immigration, September 12th, 1936.
40	Visa Werner Thiel, Bureau of Immigration, April 26th, 1927.
41	Visa Edward Kerling, Bureau of Immigration, March 5th, 1929.

No. of exhibit	
42 to 53 inc.	Records from Mayflower Hotel, Jacksonville, and Commodore Hotel, New York City, and Hotel Seminole, Jacksonville.
54	Photograph of Norma Kopp.
55	Page 21 from the issue of the "New York Times" for September 17th, 1937.
55a	Handwriting standard.
56	Torn note to Werner Thiel found in defendant's waste paper basket.
57 to 62 inc.	Post cards found in defendant's room, with translations.
914 63	Letter from defendant to Hubert Thielmann, dated April 21, 1942.
63a	Translation of Exhibit 63.
64	Post card with translation.
66	Slip of paper containing figures and endorsement of defendant.
67	Note from defendant to Werner Thiel at Hotel Commodore, dated June 27th, 1942.
68	Letter from defendant to Werner Thiel, dated November 25, 1941.
68a	Translation of Exhibit 68.
69	Letter from defendant to Heinrich Cramer, dated December 3, 1941.
69a	Translation of Exhibit 69.
70	Receipt for payment on safe deposit box, Corn Exchange Bank.
71	Record card, Corn Exchange Bank.
72	Signature card, Corn Exchange Bank.
73	Handwriting standard Werner Thiel.
74	Handwriting standard Edward John Kerling.
75	Note from defendant to Norma Kopp.
76	Page 30 of the issue of the "New York Times" of June 28th, 1942.

DEFENDANT'S EXHIBITS

A	Money belt found in defendant's room.
B	Diagram of defendant's room drawn by Agent Carden.
C	Written statement of defendant made to FBI.
D	Letter from Norma Kopp to defendant dated June 15th, 1942.
F	Page from small blue book belonging to defendant containing figures.
G	Envelope of Steiner-Rouse & Company.

915 [File endorsement omitted.]

916 In United States District Court

[Title omitted.]

Notice of appeal

Filed March 22, 1943

Name and address of appellant, Anthony Cramer, Federal Detention Headquarters, 427 West Street, New York City.

Names and addresses of appellant's attorneys, Harold R. Medina, 165 Broadway, New York City, and John McKim Minton, Jr., 295 Madison Avenue, New York City.

Offense, Treason (United States Criminal Code, § 1).

Date of judgment, December 2, 1942.

Brief description of judgment or sentence, forty-five years and $10,000 fine.

Name of prison where now confined, if not on bail, Federal Detention Headquarters, 427 West Street, New York City.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above-mentioned, on the grounds set forth below.

ANTHONY CRAMER,
Appellant.

Dated: December 3, 1942.

GROUNDS OF APPEAL

1. The Court erred in admitting into evidence, over defendant's objections, Government's Exhibit 55, being a copy of the Constitution of the United States from the issue of the New York Times of September 17th, 1937, page 21.

917 2. The Court erred in admitting into evidence, over defendant's objection, the testimony of the witness Paul Powers, the minuteman who testified as to the alleged refusal of the defendant to purchase United States War Bonds, and in denying defendant's motion to strike out such testimony.

3. The Court erred in overruling the defendant's objection to the question put to the defendant on cross-examination concerning statements made by the defendant's nephew, Norbert, in a letter written to the defendant by the said Norbert.

4. The Court erred in admitting into evidence, over defendant's objection, photographs of various explosives, caps, shovels, and other materials allegedly brought to this country by the

eight saboteurs who were tried before the Military Court in Washington following the concession by the defendant that Werner Thiel and Edward John Kerling were enemy agents engaged on a mission of sabotage to this country.

5. The Court erred in denying the defendant's motion to dismiss the indictment, made at the close of the Government's case.

6. The Court erred in denying defendant's motions to withdraw from the consideration of the jury overt acts numbers 1, 2, and 10 and each thereof.

7. The Court erred in denying the defendant's motion for the direction of a verdict of acquittal, made at the close of the entire case.

8. The Court erred in denying the defendant's motion to set aside the verdict and for a new trial.

9. The Court erred in denying the defendant's motion for
918 a mistrial, made in connection with the question put to the defendant on cross-examination concerning statements made by the defendant's nephew, Norbert, in a letter written to the defendant by the said Norbert.

10. The Court erred in refusing to grant defendant's requests to charge Nos. 2, 6, 7, 9, 17, and 18.

11. The Court erred in charging the jury with respect to the requirement of proof of each overt act by two witnesses.

919 [File endorsement omitted.]

920 In United States District Court.

[Title omitted.]

Assignments of error

Filed March 22, 1943

The following are the assignments of errors of the defendant appellant:

1. The Trial Court erred in refusing to strike out the testimony of the witness Paul Powers, as follows (Steno. Min., pp. 337–8):

"Q. Did you have a conversation with him?—A. I did.

Q. Will you give us the conversation?—A. I told him I was representing the United States Government on a pledge drive, if he would care to sign a pledge for a bond. He was not interested. I asked him if he would sign up for a stamp. He said he was not interested.

Q. Anything further said by either of you?—A. No; and he closed the door.

Q. Directing your attention to what he said, did he say anything about a ten-cent stamp?—A. He said he was not even interested in the purchase of a ten-cent stamp.

Q. Then he closed the door?—A. That is right.

Q. Was there a bell at this apartment door, or did you knock?—A. I knocked.

Q. Now after he closed the door did you knock again?—A. I did.

Q. What occurred?—A. Knowing there was other roomers in there, I thought I could get to them. He opened the door again and closed the door.

Mr. BURKE. That is all.

Mr. MEDINA. No questions. I move to strike out the entire testimony of this witness as irrelevant and of no probative force whatever on any of the issues in the case.

The COURT. I think I will let it stand, Mr. Medina.

Mr. MEDINA. I respectfully except.

921 2. The Trial Court erred in overruling the objection to the following question, and in refusing to strike out the answer thereto (Steno. Min., p. 600) and in receiving into evidence Government's Exhibit 55 (Steno. Min., p. 612):

"Q. Isn't is a fact, sir, that at one time you were particularly interested in the law of treason?—A. No, sir; I have never been interested in that.

Mr. MEDINA. I object to that question, your Honor, so that the record may be clear, and move to strike out the answer. I think your Honor realizes from some statements I have made to you that we are approaching now a matter of considerable significance and I want my record clear.

The COURT. I take it that there is some question of law you would like to discuss?

Mr. MEDINA. Yes, your Honor.

Mr. CORREA. I am going to attempt to impeach the witness on his last answer, Judge. I won't make a specific offer of proof, or I won't if counsel has objection. I will put it that way, until your Honor has ruled.

The COURT. I will excuse the jury so that the matter may be discussed.

* * * * * * *

The COURT. If it is shown, as you say, it has been, that those marks were put on it by the defendant and it was found in his room, I shall admit it as material and relevant.

Mr. MEDINA. And I take it your Honor does not admit it because Mr. Cramer said he had not studied law and had not studied up the law of treason.

The COURT. I am not going to limit the grounds on which I receive it.

Mr. CORREA. The foundation question, Judge, was this: You were particularly interested in the law of treason, were you not; to which the witness said, No.

Mr. MEDINA. Well, I objected, your Honor, you remember, to that question, and I moved to strike out the answer.

The COURT. The motion is denied.

Mr. MEDINA. Exception.

* * * * * * *

Mr. CORREA. I offer in evidence Government's Exhibit 55 for identification.

922 Mr. MEDINA. I object to that as irrelevant and immaterial, as having no probative force whatever; and upon the further ground that if it should be deemed to have any slight probative value that is far outweighed by its atmospheric value which I claim will be highly prejudicial. It is irrelevant and should be excluded.

* * * * * * *

The COURT. That is Exhibit 55 for identification, and also 55-A—

Mr. CORREA. In evidence, which was offered without limitation. In other words this is received—

Mr. MEDINA. I object to both, as they relate to the same thing, and I have already stated the grounds of my objection, Your Honor.

The COURT. They are received in evidence.

Mr. MEDINA. I respectfully except.

(Government's Exhibits 55 for identification now marked in evidence.)

3. The Trial Court erred in overruling the defendant's objection to the following question and in refusing to strike out the answer thereto (Steno. Min. pp. 653-4):

"Q. Now, sir, during the year 1941 didn't you receive letters from your nephew Norbert?—A. Yes, sir.

Q. Now isn't it the fact, sir, that Norbert's father—that was your brother, wasn't it?—A. That is right.

Q. Through Norbert warned you that your letters discussed the United States in such an unfriendly fashion that Norbert's father feared that you would be put on the black list, because according to him the letters went through an American censorship.

Mr. MEDINA. I object to that question as improper, and that the very wording of the question is such that I move for a mistrial.

The COURT. Motion denied.

Mr. MEDINA. What is Your Honor's ruling?

The COURT. The motion is denied.

Mr. MEDINA. Exception. What is Your Honor's ruling on my objection?

The COURT. Overruled.

Mr. MEDINA. Exception. These are letters from someone else, and I claim they are not binding upon the defendant. Your Honor realizes that, I take it.

923 By Mr. CORREA:

Q. Do you have the question?—A. Yes, sir. If there was any purpose behind it, I have been trying to show that we still have freedom of the press and thought in the United States.

Mr. CORREA. I move to strike the answer, and ask that the question be read and the witness be directed to answer it responsively.

The COURT. (to witness). Can't you answer that directly? Answer that question directly.

The WITNESS. Whether it was hostile or whether it was friendly? or——

Mr. MEDINA. No; the question is whether you got letters which said that.

The WITNESS. Well, I have received a letter from my nephew Norbert which mentions that. I admit that.

Mr. MEDINA. I move to strike out the answer upon the grounds on which I objected to the question.

The COURT. The motion is denied.

Mr. MEDINA. Exception."

4. The Trial Court erred in receiving into evidence Government's Exhibits 11 to 27, inclusive, and in overruling the defendant's objection to the testimony of the witness D. J. Parsons, as follows. (Stenog. Min., pp. 77-92 inc.):

"Q. Now you referred to Edward Kerling. I show you a photograph which has heretofore been marked Government's Exhibit 3 for identification and ask you whether or not that is a picture of the man to whom you refer as Edward Kerling [handing]?—A. Yes, sir.

Mr. CORREA. Now, if Your Honor please, in connection with the further testimony of this witness concerning these materials, I should like to offer at this time these photographs 11 to 27 for identification, in evidence.

Mr. MEDINA. May it please the Court, I should like to state our position as to this. We object to them and we will object, as I indicated in my opening, to similar proof, and with Your Honor's permission I should like to elaborate the basis for my objection.

The COURT. I think I understand it. You have made the point before.

924 Mr. MEDINA. Well, we do not wish to urge it except on general terms, if your Honor does not wish me to, but I think it a rather important point from the standpoint of the defense, and if you think that elaboration of it in the presence of the jury might be prejudicial to the Government I shall be very glad to have the jury withdraw.

The COURT. I do not know whether it would be prejudicial to either side or helpful to either side. I look at it as a question of law.

Mr. MEDINA. All I wish to do is place my point on the record, your Honor, and I don't want to do it in a way that is in any sense objectionable. On the other hand I do think it is important and my right to place the position that we have plainly on the record so that I may not need to be getting up again and again when a similar thing is produced.

The COURT. You may do so. State the grounds of your objection. I don't think we need to go into an extended argument.

Mr. MEDINA. And I shall not do that. Now we object to them as incompetent, irrelevant, and immaterial——

The COURT. I would suggest that you just state your grounds simply.

Mr. MEDINA. I shall try to, your Honor; we object on the ground that the evidence is irrelevant, immaterial, and incompetent, and specifically upon the ground that in view of the concession made here, and in view of the proof by the witness Burger, which would seem to cover the field thoroughly and comprehensively, we believe that evidence as to such details as appear in these photographs and other similar evidence that may be produced a little later, will have an amount of effect out of all proportion to its true judicial worth and will be prejudicial to the defendant; it will confuse the issues, and it will get, inevitably, the minds of the jurors away from what is the central and simple issue; and is bound, particularly when accumulated here, to do so. We have a large number of photographs; there are many other things of a similar character that will be produced, and the effect of all that will be to accumulate, as it seems to us, prejudicial matter on the grounds that I have stated.

And, of course, as Mr. Minton calls to my attention, too, there is no pretense or claim that the defendant had anything to do with these matters. He came in, according to the concession made by Mr. Correa in his opening, at a later time. If there were some contention that he was connected with this scheme or this plot it would be different, but there is no such claim.

925 Mr. CORREA. If your Honor please, I should like to reply particularly to that last, which I think is a misapprehension of the Government's position. First, the material is offered at this time, subject to connection it is true, in that we will establish that this is the material which was brought over by the group of which Edward John Kerling and Werner Thiel were members, and we will connect specifically Edward John Kerling and Werner Thiel with the defendant Cramer as being the enemies of the United States that Cramer aided. I might point out that at the very time Cramer was aiding these enemies of the United States, this material was secreted, as the proof of this witness shows, in the sands of Florida, and secreted there for use by the selfsame enemies of the United States, Werner Thiel and Edward John Kerling, who, as our proof will demonstrate, the defendant Cramer was aiding.

I submit there is no concession whatever by the Government, far from it, that Cramer is not connected with this plan. Our contention is that Cramer is very closely identified with the plan in giving aid and comfort to the men who put this material here with the intention of using it.

Mr. MEDINA. If your Honor please, Mr. Correa's statement is exactly what I claim he said. They do not claim Mr. Cramer had any part in this planning over in Berlin, or had any contact with these men as they got off of this submarine or participated in the plot and scheme there. Mr. Correa merely claims that later Mr. Cramer had to do with Thiel and Kerling in New York; not that he had any participation in any of this plot, and so we most earnestly urge the objection upon your Honor.

Mr. CORREA. I point out, if your Honor please, that at the time Cramer had to do with Thiel and Kerling in New York, what counsel chooses to call a plot or plan, whatever he wishes to call it, was still under foot. The very material we are discussing here, and we are not discussing something in Berlin but in the sands on the coast of Florida, waiting there to be used; neither Kerling nor Thiel had been apprehended and the gravamen of Cramer's offense was in that he aided and comforted them in furtherance of that purpose which was to use this material, and I think we are entitled to show what the material was and how it could be used.

The COURT. I think they should be received, Mr. Medina.

926 Mr. MEDINA. I respectfully except.

The COURT. There is one point I would like a little explanation about. You objected on the ground that they were incompetent. Did you mean there was a lack of proof?

Mr. MEDINA. No; I do not object on the ground that the photographs have not been properly identified. I might well object

upon that ground but I do not. I do not raise any such point as that.

The COURT. Then there is nothing in your objections on the ground that they are incompetent.

Mr. MEDINA. Well, I use that general phrase that we lawyers are so accustomed to, just as a sort of catch-all, but with no endeavor to raise the technical question of lack of identification of the photography.

The COURT. I did not want to be caught in that category.

Mr. MEDINA. No; I would never have claimed any such thing as that.

Mr. CORREA. I take it it is understood, Judge, because this is one case where I think we are disabled from bringing the original exhibits here.

Mr. MEDINA. May I note my exception to your Honor's ruling?

(Government's Exhibits 11 to 27 inclusive for identification received in evidence.)

(Short recess.)

By Mr. CORREA:

Q. Now, sir, one question first: You said the point at which you found this material was about 4.3 miles—A. 4.3 miles.

Q. From Ponte Vedra.—A. From Ponte Vedra beach.

Q. How far was it from Jacksonville, Florida—A. Just a little over thirty miles.

Q. And after the material was found on the beach did you there, or subsequently at some other place, make a further examination of it?—A. I did.

Q. And did you make an examination with a view to ascertaining the quality and nature of the materials found there?—A. I did.

Q. By the way, in what form was the material at the time you found it? That is, was it packaged in any way?—A. It was. All of the material was contained in four wood boxes which were bound with metal strips.

Q. And you subsequently made an analysis of that at the laboratory; is that correct?—A. I did.

927 Q. Will you tell us generally what materials there were in there; that if, is you would list the kinds of materials that were contained in those four boxes or packages?

Mr. MEDINA. I renew the objection that I made a few moments ago, your Honor, on the same grounds.

The COURT. The same ruling.

Mr. MEDINA. Exception.

A. There were in the four boxes blocks of trinitrotoluol, or TNT, as it is familiarly known, which is a high explosive, blocks

containing explosives made to simulate lumps of coal, safety fuse, a standard fuse which is used to set off explosives; detonating fuse, which is used to connect charges of explosives that are to be set off simultaneously; detonators of several kinds, those set off electrically, as well as detonators to be set off by fuse; adapters to permit the use of the fuse with other detonators or incendiary igniters; there were small incendiary devices or incendiary igniters; fuse lighters, small instruments used to ignite the safety fuse; wood blocks containing detonators both of the standard type and of a special type which were threaded; electrical devices for setting off the special detonators; timing devices, both mechanical and chemical; time devices constructed or concealed as pen and pencil sets, and a paper pan containing an abrasive mixture.

Q. Could you tell us approximately how many blocks of the TNT were included in this material?

Mr. MEDINA. May it please the Court, may I be deemed to have objected to this entire line so that I will not have to interrupt?

The COURT. Yes, Mr. Medina.

Mr. MEDINA. Thank you. And I respectfully except to your Honor's ruling.

A. There were 46 blocks of the TNT, each block weighing one kilogram, or approximately 2.2 pounds.

Q. I think you mentioned that there were blocks; was this TNT made in the form of a lump of coal?—A. In addition to the 46 demolition blocks of TNT there were four of the so-called coal blocks containing TNT.

Q. And what were they made of besides the TNT?—A. The explosive side of the TNT was covered with a black plastic material to give it the appearance of a lump of coal.

Q. And you mentioned various detonators and incendiary devices?—A. Yes.

Q. Can you tell us approximately how many there were of each type?—A. Yes; there were 25 electric detonators; that is, small metal tubes filled with a charge of a violent explosive which is set off by connecting them to a battery or other source of electrical energy. There were 75 fuse-type detonators which were contained in wood blocks which were sealed. There were 50 detonators of a special type which were threaded to permit their use with a chemical or mechanical timing device, and there were 25 threaded igniters or incendiary devices contained also in wood blocks.

928. Q. I will show you Government's Exhibit 11 and ask you if that is a photograph of the containers or of the material as you found it?—A. This is a photograph of the four

boxes before opening, and after they were removed from the beach.

Mr. CORREA. May the jury see that?

The COURT. That is exhibit what?

Mr. CORREA. Exhibit 11 in evidence, your Honor.

(Exhibit handed to the jury.)

Q. Now I show you Exhibits 12 and 13 and ask you what is set forth therein?—A. Photographs 12 and 13 show two of the boxes after they had been opened and the photograph portrays the wood boxes, the metal liners which were soldered or hermetically sealed, and in each photograph 18 TNT demolition blocks which were individually wrapped in paper.

Q. And in each photograph one block appears unwrapped; is that correct?—A. That is correct.

(Government's Exhibits 12 and 13 handed to the jury.)

Q. I show you Government's Exhibit 14 in evidence [handing to witness], and ask you what is set forth in that picture?—A. This photograph Government's Exhibit 14 shows the third wood box after it had been opened, the metal liner, ten more of the TNT demolition blocks, the four bombs made to simulate lumps of coal, four coils of safety fuse, and one coil of detonator fuse.

Q. Now I show you, sir, Government's Exhibit 15 [handing to witness], and ask what that represents?—A. Government's Exhibit 15 is a photograph showing the fourth box after it had been opened, the metal liner, and the contents, which consisted of the various detonators, igniters, the delay devices, and the abrasive.

Q. And Government's Exhibit 16 [handing to witness]?—A. Government's Exhibit 16 is a photograph of one of the bombs constructed to simulate a lump of coal.

Q. By the way, I note on Government's Exhibit 16 there appears a rule with the notation of 2 inches, in a graduated scale.—A. That is correct. The scale was placed in the photograph to show the size of the coal bomb.

Q. How many such coal bombs were there did you say?—A. There were four in this lot.

Q. I show you Government's Exhibit 17 in evidence [handing to witness], which is a photograph of several coils of wire, and ask you what it is?—A. Government's Exhibit 17 is a photograph showing the four coils of safety fuse and the one coil of detonating fuse.

Q. And Government's Exhibit 18 [handing to witness], which is another coil?—A. Government's Exhibit 18 is a photograph of a piece of a detonating fuse, which is also shown in Government's Exhibit 17.

Q. That is a close-up of the same fuse; is that correct?—A. This is a close-up of a piece of detonating fuse; yes.

Q. And Government's Exhibit 19 [handing to witness]?—A. Government's Exhibit 19 is a group photograph of the detonators, igniting devices, and accessories contained in the lot of explosive material.

Q. And Government's Exhibit 20 [handing to witness]?—A. Government's Exhibit 20 is a close-up photograph of one of the electric detonators which is shown in photograph Exhibit 19 at the upper center.

Q. The center of these three groups; is that correct?—A. That is correct.

Q. That is a close-up of one of those detonators?—A. It is.

Q. I show you, sir, Government's Exhibits 21 and 22 [handing to witness].—A. Government's Exhibit 21 is a close-up photograph showing one each of the three types of wood blocks which are also shown in Government's Exhibit 19, and these blocks each contain a different type of detonator or igniting device. The block shown in the center contained five—it is one of the blocks containing five commercial type fuse detonators. The block on the right is one of those, each of which contained five of the special type threaded detonators, and the block on the left which has been opened is one of those, each of which contained five of the special incendiary igniters.

Q. That is Government's Exhibit 21?—A. Yes.

Q. Now Government's Exhibit 22 is a close-up, is it not, of one of the——A. It is. Government's Exhibit 22 is a close-up photograph of one of the electric matches, which is also shown in Government's Exhibit 19. It is a small device which will accommodate either the threaded detonator or threaded igniter, in order that they may be set off electrically.

Q. And this too is photographed with a rule?—A. It is.

Q. To indicate its size; is that correct?—A. Yes.

Q. Now Government's Exhibit 23 [handing to witness].—A. Government's Exhibit 23 is a photograph of ten mechanical timing devices one of which is wrapped in paper, the other nine having been unwrapped. In addition there is also shown the box in which these devices were packed, the caps and primers for these time devices, which provide a delay of fourteen days, in setting off a delay explosive or incendiary.

930 Q. That is, they could be set to explode or ignite a charge fourteen days from the time they were set?—A. Yes, sir.

Q. You call them mechanical timing devices. Are they similar to a clock mechanism?—A. A time clock or mechanical time device. Either description is correct.

Q. Now, sir, as to Government's Exhibit 24, which is identified

by the witness by some writing appearing on the top of the box depicted there [handing to witness].—A. Government's Exhibit 24 is a box containing ten chemical delay devices, which are small brass and plastic instruments providing a delay of approximately an hour to 70 minutes. The base of these devices are threaded to accommodate the detonator or incendiary igniter.

Q. You say, these provide a delay of an hour to 70 minutes?—A. Approximately that.

Q. Was that notation "70 Minuten" which appears on the top of the box on the box when it was found?—A. It was.

Q. I show you, sir, Government's Exhibits 25 and 26 [handing to witness], and ask you first is it not true that Exhibit 26 is a close-up of one of the objects depicted in Government's Exhibit 25?—A. It is.

Q. What were those objects; will you describe them?—A. Government's Exhibit 25 is a group of glass ampules each containing a quantity of sulphuric acid to be used with the chemical delay shown in Government's Exhibit 24; and photograph Government's Exhibit 26 is a close-up of one of these ampules of sulphuric acid.

Q. That is, they are used in connection with the delay devices which you said operated on a 60- or 70-minute period of delay?—A. That is correct.

Q. By the way, referring again to Government's Exhibit 25, does that show the way in which these ampules of sulphuric acid were packed?—A. The photograph shows the box after it was opened. The bottom and top of the box are now empty. The white powder was contained in the boxes as a protective medium for the capsules.

Q. Now, sir, I show you Government's Exhibit 27 [handing to witness], and ask you what the material depicted there is?—A. Government's Exhibit 27 is a group photograph of the five pen and pencil time delay devices which are contained in this equipment.

Q. Would you state, sir, how this pen and pencil set is used. You have told us what its function was, but how were those particular sets usable?—A. It is necessary to combine the pen and pencil in order to use it as a delay mechanism. The cap of the pen is removed and the top and clip of the pencil are also
931 removed. The threads of the pen will then fit into the body of the pencil, and the point of the pencil when removed reveals threads which will accommodate either a detonator or an incendiary igniter. The end of the pen when twisted will start a chemical delay action which varies in this equipment from two and three-quarter hours to 13 hours, depending upon

which set is used, and after that period of delay the chemical delay reaction will set off either a detonator or igniter."

5. The Trial Court erred in denying the defendant's motion to dismiss the indictment made at the close of the Government's case (Steno. Min., p. 425).

6. The Trial Court erred in denying the motion to withdraw from the consideration of the jury overt acts Nos. 1, 2, and 10, and each thereof (Steno. Min., pp. 736–7).

7. The Trial Court erred in denying the defendant's motion for a direction of a verdict of acquittal, made at the close of the entire case (Steno. Min., p. 734).

8. The Trial Court erred in denying the defendant's motion to set aside the verdict and to order a new trial (Steno. Min., p. 825).

9. The Trial Court erred in denying the defendant's motion for a mistrial, made in connection with a question put to the defendant on cross-examination concerning statements made by the defendant's nephew, Norbert, in a letter written to the defendant by the said Norbert (Steno. Min., p. 653).

10. The Trial Court erred in refusing to grant defendant's requests to charge Nos. 2, 6, 7, 9, 17, and 18, as follows:

"2. Unless the jury are satisfied beyond a reasonable doubt that the defendant Cramer knew that Kerling and Thiel, or either of them, was an agent or a spy of the German Reich at the time he did the several acts testified to and that he did the several acts for the purpose and with the intent of assisting the German Reich in the prosecution of its war or in hampering the United States in the prosecution of its war against the German Reich, the defendant must be acquitted."

932 "6. The several acts of the defendant must have been committed with an actual knowledge of the fact that Kerling and Thiel, or either of them, were in fact agents and spies of the German Reich. A mere suspicion or conjecture that they might have been spies or agents of the German Reich and thus enemies of the United States is not sufficient to warrant a conviction."

"7. In order to convict the defendant the jury must find that the defendant's acts and conduct were the result, not of negligence or thoughtlessness, but were inspired by a definite intent and purpose to assist Thiel and Kerling, or either of them, in the prosecution of their mission to this country."

"9. Letters or statements made by the defendant before this country's entry into the war, insofar as they may have indicated sympathy or preference for Germany or any criticism of this country's policy with respect to the war, were, as a matter of

law, entirely lawful and proper and the jury should not consider such letters or statements as any evidence of treasonable intent."

"17. With respect to overt act No. 10, if the jury find that the defendant made false statements to the agents of the Department of Justice at the time of his apprehension for the purpose of concealing the name and whereabouts of Werner Thiel from the Selective Service authorities and not with the intent and purpose of rendering aid and comfort to Thiel as an enemy agent, knowing him to be such, such false statements do not constitute treasonable conduct."

"18. If the jury find that these false statements were prompted solely by the defendant's fear that he would be involved in some investigation by the Department of Justice and not made for the purpose of concealing Thiel's identity and whereabouts, knowing him to be an enemy agent, such false statements do not constitute treasonable conduct."

11. The Trial Court erred in charging the jury with respect to the requirement of proof of each overt act by two witnesses as follows (Steno. Min., pp. ok11, ok12, ok20, ok22):

"The Constitution of the United States provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act. This means that the Government must prove at least one of the three overt acts charged in the indictment by the testimony of two witnesses. These witnesses must be direct witnesses to the overt act. Where the overt act is of a type which is separable into parts, that is, a con-
933 tinuance and composite act made up of several circumstances and passing through several stages, there must be two direct witnesses to each part of the act, but they need not be the same two witnesses who testified to other parts of the act, so long as each part of the overt act is supported by the testimony of two witnesses.

* * * * * *

I also except to your Honor's instruction with reference to the two witnesses to the overt acts, it being my understanding that your Honor charged that it was not necessary that there be two witnesses to each circumstance or each stage of the overt act.

The COURT. I don't think I understood you clearly.

Mr. MEDINA. Your Honor will recall that I submitted a written memoranda indicating—and I do not know whether you think it proper for me to discuss this now—those authorities.

The COURT. No, not discuss it; merely take your exception. I want to understand what you except to.

Mr. MEDINA. There are two views. I thought your Honor in your charge, as I listened to it, accepted the view of one of those

that I had thought was erroneous, and I want to state my objection to the way in which your Honor charged that the two witness rule was applicable.

The COURT. Yes; I think I understand you. You disagree with the statement of the Court that if the overt act is separable into parts, that is, a continuing and composite act made up of several circumstances and passing through several stages, there must be two witnesses to each part of the act. That is the part you object to.

Mr. MEDINA. I do. That is precisely the part.

The COURT. I so charged, and you may have an exception."

12. The Trial Court erred in stating, in the presence of the jury, that counsel for the defendant had been assigned by the Court (Steno. Min., p. ok1).

Wherefore, the defendant prays that the judgment herein be reversed and that the sentence imposed on said judgment be set aside.

HAROLD R. MEDINA and
JOHN McKIM MINTON, JR.,
Attorneys for Defendant.

934 [File endorsement omitted.]

935 In United States District Court

[Title omitted]

Stipulation dispensing with printing of exhibits

March 16, 1943

It is hereby stipulated by and between the United States District Attorney and the attorneys for the defendant that the printing of all exhibits, on the appeal of the defendant to the Circuit Court of Appeals, may be dispensed with and that said exhibits, or photostatic copies thereof, may be handed up to the Court by either party on the oral argument of the appeal.

Dated: March 16th, 1943.

MATHIAS F. CORREA,
United States District Attorney.

HAROLD R. MEDINA,
Attorney for Defendant.

JOHN McKIM MINTON, JR.,
Attorney for Defendant.

936 [File endorsement omitted.]

937 [Clerk's certificate to foregoing transcript omitted in printing.]

938 [File endorsement omitted.]

939 In United States Circuit Court of Appeals
Second Circuit

UNITED STATES OF AMERICA

vs.

ANTHONY CRAMER, DEFENDANT-APPELLANT

Order permitting filing of typewritten record and brief.

March 1, 1943

Upon the annexed stipulation, signed by the United States District Attorney and the attorneys for the defendant, and upon the annexed affidavit of Harold R. Medina, duly sworn to the 24th day of February, 1943, it is

Ordered that the Clerk of the District Court, Southern District of New York, accept for filing a bill of exceptions herein consisting of one typewritten set of the stenographer's minutes of the trial in the District Court, typewritten copies of defendant-appellant's assignment of errors, the indictment and all necessary orders, and a stipulation, to be made with the approval of the District Court, dispensing with the printing and filing of the exhibits and providing that either the original exhibits, or photostatic copies thereof, may be handed up to the Court on the oral argument of the appeal, and it is

Further ordered that, upon the settlement and filing of the bill of exceptions in the form aforesaid, the Clerk of the Dis-
940 trict Court shall transmit the same, together with his certificate, to the Clerk of the Circuit Court of Appeals, Second Circuit, as the Record on Appeal on which the appeal and all proceedings in this court shall be heard; and it is

Further ordered that, in lieu of printed briefs, defendant-appellant may file with the Clerk of this court three typewritten copies of his brief and serve one copy thereof upon the United States District Attorney and that said brief may be not more than 75 pages in length.

LEARNED HAND,
United States Circuit Court Judge.

941 [File endorsement omitted.]

942 In the United States Circuit Court of Appeals for the Second Circuit

No. 270—October Term, 1942

(Argued June 7, 1943)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY CRAMER, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Southern District of New York.

Anthony Cramer was convicted of treason under 18 U. S. C. A. § 1, and he appeals. Affirmed.

Before SWAN, CHASE, and CLARK, Circuit Judges.

HAROLD R. MEDINA, of New York City (John McKim Minton, Jr., and John W. Jordan, both of New York City, on the brief), for defendant-appellant.

MATHIAS F. CORREA, U. S. Atty., of New York City (Richard J. Burke and Louis W. Goodkind, Asst. U. S. Attys., both of New York City, on the brief), for plaintiff-appellee.

Opinion

Aug. 20, 1943.

943 CLARK, Circuit Judge:

Appellant, Anthony Cramer, was convicted by a jury under an indictment charging treason by adhering to enemies of the United States, giving them aid and comfort, in violation of Sec. 1 of the United States Criminal Code, 18 U. S. C. A. § 1. He was sentenced to 45 years' imprisonment and fined $10,000. His appeal challenges the sufficiency of the evidence to sustain the conviction, the legal sufficiency of the overt acts submitted to the jury, the adequacy of proof of the overt acts, and the admission of alleged prejudicial evidence.

Sec. 1 of the Criminal Code provides: "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." This enacts the definition of treason laid down in Art. 3, § 3, cl. 1, of the Constitution

of the United States, all parts of which are also here controlling, as follows: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

In substance appellant is charged with having aided and comforted Werner Thiel and Edward John Kerling, German saboteurs, by receiving and safeguarding property of Thiel, carrying out Thiel's requests and instructions to establish contact and communication with others, and giving false information to conceal his activities. Thiel and Kerling were two of the eight German saboteurs who, equipped with various high explosives and other sabotage devices for use against American industry, were landed on the shores of Florida and Long Island in June 1942, by a German submarine, but who were all shortly apprehended, tried,
944 and sentenced, six to death, two to long-term imprisonment. Cf. Ex parte Quirin, 317 U. S. 1, 63 S. Ct. 2.

Appellant, a naturalized citizen, was born in Germany in 1900 and served in the German army during World War I. He came to this country in 1925 with the announced intention of becoming a citizen, which he did in 1936. He first met Thiel while working in Detroit in 1929. They became fast friends; and when appellant moved to Hammond, Indiana, in 1933, he sent Thiel money to come out to work there, too. In 1934, they joined the Friends of New Germany, which subsequently became the notorious German Bund. Appellant was treasurer, but resigned in 1935, as he claims, because it was a money swindle and because he disliked its emphasis on marching and other martial activities. In 1936, he returned to his home in Germany for a short visit. While there he attended the Olympic games, to which a number of the Friends of New Germany had also come.

Upon his return in 1936, he and Thiel after an unsuccessful venture with a Florida restaurant went to New York, where they lived together or in close contact with each other until Thiel left for Germany in March 1941—to enter a school for saboteurs, as it now appears, although appellant claims not to have known this. Appellant admits, however, that he realized during the time they were so closely associated that Thiel was an ardent Nazi. While they were in New York, appellant loaned Thiel money on a number of occasions, totaling, according to an account book kept by appellant and placed in evidence, $217.50. This sum was unpaid when Thiel left for Germany.

Appellant did not see Thiel again until June 22, 1942, soon after the latter's landing in Florida from a German submarine. Appellant, testifying in his own behalf, gave a full account of the

events of that day and of the ensuing week which formed
945 the basis of his arrest. Since this presents the events in sequence, as well as in the light most favorable to him, we can well start with his story. He was in his apartment in New York City on the morning of June 22 when he heard a strange voice call his name outside the door. He decided not to answer, and a note was then slipped under his door, reading: "Be at the Grand Central station tonight at 8 o'clock, the upper platform near the information booth, Franz from Chicago has come into town and wants to see you; don't fail to be there." Appellant claims he knew no Franz from Chicago, but when evening came, curiosity got the better of him and he went to the appointed place. There Thiel met him. Appellant, astonished, sought the details of his return to this country and asked Thiel particularly whether he had come by submarine. Thiel looked startled and then with a smile put him off with the promise to give the full story later. He pressed upon appellant, however, the fact that his name was now Bill Thomas and that he was anti-Nazi.

From the station they went to the Twin Oaks Inn at Lexington Avenue and 44th Street for a drink, and while there Thiel asked appellant about his fiancee, Norma Kopp, in Westport, Connecticut; Thiel adopted appellant's suggestion that appellant write her to come to New York City, without, however, disclosing his arrival. When appellant told Thiel that agents of the Federal Bureau of Investigation had inquired about him, Thiel showed a draft registration card with the name William Thomas on it and said that was to avoid any trouble. He again put off further questions as to his reasons for coming back from Germany with the suggestion that they wait until Norma arrived and then they could discuss the whole thing over a glass of wine.

Later in their discussion of the bombings of German cities, however, Thiel let slip that "the only time I really was scared to
946 death was when I came over here we got bombed." In appellant's own words: "One thought, it came to me in a flash, I said 'Then you have come over by submarine, haven't you?'" Again he was put off by Thiel, who apparently became irritated at his inquisitorial attitude. Appellant admits, however, that by then he was sufficiently convinced of the idea to try to broach the subject again, though unsuccessfully, by relating an experience of a submarine which he had heard over the radio. Thiel turned to the subject of his debt to appellant and stated that he could now pay it, as he had about three and a half or four thousand dollars with him. He told appellant that "if you have the right kind of connection you can even get dollars in Germany." He accepted appellant's suggestion that he place the balance in appellant's safe deposit box.

After leaving the Twin Oaks Inn they went for a drink to the Commodore Hotel, where Thiel told appellant he was staying. Before parting they walked outside the hotel and the station for a short time talking and made arrangements for a meeting the next night at the Twin Oaks Inn, as Thiel declared that he could not come to appellant's apartment because he had too many acquaintances there and did not want to be seen.

At their second meeting, June 23, they were joined by Edward Kerling (the leader of the Florida group of saboteurs) for about three quarters of an hour, and they all discussed German history. After Kerling left, Thiel told appellant he had his money in a belt on his body, and he went to the men's room to remove it. Thiel paid the bill, as he had the previous night; they walked to the street; and Thiel there handed the belt over. Thiel told appellant to hold some out from the safe deposit box for ready use. After stopping in Thompson's Cafeteria for a cup of coffee, they made arrangements to meet again two days later, on June 25.

947 Upon reaching home appellant took the money out of the belt and put the belt in his shoe box. The next night he counted the money, which totaled $3,670. He made a memo showing the denominations of the bills and a deduction from the total for $200 due him. The same evening he wrote Norma to come to New York, as he had "news of the most sensational nature" for her. The next day he mailed the letter and deposited the money in his box, keeping $160 for Thiel's immediate use in a book in his apartment. Appellant did not find Thiel at the appointed place that night for the simple reason that Thiel had been arrested. The next night he went again without success. Shortly after he returned home, Norma arrived and he told her Thiel was back. She was incredulous; and he could tell her only that Thiel might have come by submarine, that he had some $3,000 with him, and that he had promised a full story when he saw her. Appellant decided that night to leave a note at the Commodore Hotel for Thiel telling him to meet them the next afternoon at four o'clock. Thiel, of course, never met them.

The next night, June 27, appellant was arrested by the FBI. He was questioned and lied that Thiel's name was Bill Thomas, that Thiel had not been outside the United States, and that most of the money in the bank was appellant's own and only a couple of hundred dollars was in the money belt. He admits these lies now, but asserts that they were designed solely to prevent Thiel's punishment as a draft dodger. The money and the money belt were found by the FBI agents at the places in his room and in the bank to which appellant directed them.

All this, of course, is appellant's version, and he claims that he

sought simply to aid Thiel as a friend and had no treasonable intentions. But strongly evidential of a state of mind hostile to the United States were three letters he had written shortly prior
948 to these events, in which he had expressed warm support of the German army and the German people in their war.[1] Directly contradictory also to his denial that he ever knew or suspected that Thiel was an enemy agent is the testimony of Norma Kopp and of Special Agent Ostholthoff of the FBI. Norma Kopp testified that when she met appellant in New York he told her that Thiel had landed from a U-boat off Florida, that he had brought over money from the German Government, and that he got instructions from a "sitz," a hide-out, in the Bronx. Ostholthoff also testified that appellant had asked to speak to him alone during the FBI examination and had then told him that Thiel had said he was here on a mission for the German Government and that he (appellant) thought it was to stir up unrest among the people and probably spread propaganda.

This testimony was corroborated by a written statement signed by appellant a little later that same night wherein he declared that he had a hunch Thiel was here to spread stories and circulate rumors, and that Kerling was here for the same purpose, that he also thought Thiel might have gotten the money from
949 the German Government, and that he had told Norma Kopp of these hunches. He also stated, "I know ["knew" was scratched out] that it is wrong for a person to incite unrest among citizens by spreading stories and circulating rumors during war-time, but if Thiel had come over to the United States to engage in such activity, I would not think of reporting him, because I would never betray a friend." It is without significance that appellant did not here assert that Thiel told him he was on a mission for the German Government, for the decisive issue must be the nature of the mission and there is no inconsistence between the written statement and Ostholthoff's testimony as to the extent of appellant's knowledge or belief that the mission was in no event peaceful or lawful.

This statement was introduced in evidence by defendant, who

[1] Writing Thiel in Germany, November 25, 1941, appellant said that "defiance, boldness, will, and sharp weapons will decide the war, and the German Army and the German people are not lacking in these," that he was "very discontent" and sat here "in pitiable comfort," and that he had refused a job in Detroit at $100 per week because "I do not want to soil my hands with war work." To his family in Germany he wrote December 3, 1941, of "the gigantic sacrifices which the glorious, disciplined German Army is making from day to day for the Homeland," that "every day here I hear the shrieks of hatred and the clamor for annihilation from the hostile foreigners," and that a lost war "means today a complete extirpation of the German nation." To a friend in Chicago he wrote April 21, 1942, objecting to conscription "after one has spent almost half a lifetime here in the States," and saying "personally I should not care at all to be misused by the American army as a World conqueror." All the letters were written in German.

on direct examination admitted that everything in it was true.[2] On cross examination, however, confronted with the particular assertions noted above, his claim was that he had made them simply to avoid appearing "empty-minded" and because "I did not know the consequences of my statement." Even in the cross examination, however, he testified that he had a hunch
950 Thiel was on a mission for the German Government. And while he subsequently retracted this testimony to say simply that he had a hunch Thiel had come over on a German submarine, at the same time he admitted some suspicions in that he had asked Thiel if he was here to incite unrest and spread rumors.

Two elements are essential to a conviction for treason: a treasonable intent and an overt act in manifestation of that intent. From all the testimony, including appellant's own, the jury could properly find that he knew some improper enterprise was afoot and that he intended to aid the enemy in its prosecution. When one's country, though adopted, is at war, one cannot, without risk of conviction of giving aid and comfort to the enemy, freely associate even with old friends or assist them even in comparatively small ways, as by banking their funds or intermediating with others for them—once one knows or reasonably suspects them to be here in the role of illegal invaders, whether armed physically or with the more modern, but nonetheless destructive, weapon of propaganda. The jury could, therefore, properly find as it did, provided it also relied on a legally sufficient overt act, testified to by two witnesses. Appellant's attack on the sufficiency of the overt acts considered by the jury brings us to the principal issue on this appeal.

Three overt acts were submitted to the jury, with the instruction that proof of any one would be sufficient to sustain a conviction if the treasonable intent was also found. They were numbered 1, 2, and 10 in the indictment and alleged respectively:

"1. That on June 23rd, 1942, the defendant met with Thiel and Kerling at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City of New York, and did confer, treat, and counsel with the said Thiel and Kerling for a period of time."

951 "2. That on June 23rd, 1942, the defendant did accompany, confer, treat, and counsel with Thiel for a period of

[2] The record does not disclose when appellant was questioned and this statement taken by the F. B. I. agents with reference to his arraignment. Nor has the point been argued. Defendant himself introduced the statement to corroborate his own testimony, and under the circumstances the testimony as to the questioning itself was fairly founded on the statement. It may be noted, too, that appellant does not claim that the examination was overburdensome or that he was in any wise imposed upon by the agents; and at the beginning of the written statement he specifically declared that he made "the following voluntary statement," "having been previously informed that I do not have to make any statement if I do not desire to, and that anything I may say herein may be used against me. No threats or promises of any kind have been made to me in giving this statement." There is no issue, therefore, under McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, and United States v. Haupt, et al., 7 Cir., — F. 2d —, June 29, 1943; and see United States v. Hoffman, 2 Cir., — F. 2d —, July 26, 1943.

time at the Twin Oaks Inn at Lexington Avenue and 44th Street and at Thompson's Cafeteria on 42nd Street, both in the City of New York."

"10. That on June 27th, 1942 the defendant gave false information and made false statements regarding Werner Thiel to Special Agents Willis and Ostholthoff of the Federal Bureau of Investigation as follows: (1) that Werner Thiel's name was Bill Thomas; (2) that from March 1941 until June 1942 Thiel had been working in a factory on the west coast of the United States; (3) that during the aforesaid period Werner Thiel had not been out of the United States; (4) that the money belt given him by Werner Thiel in June, 1942 had contained only a couple of hundred dollars which Werner Thiel had owed him; and (5) that the $3,500 in the defendant's safe deposit box at the Corn Exchange Bank, on East 86th Street, belonged to him and had been obtained by him from the sale of securities because he considered it safer there than in his savings account in said bank; that the foregoing false information was given for the purpose of concealing the identity and mission of the said Werner Thiel."

The legal sufficiency of each one of these acts separately and of all together was challenged by appellant by appropriate motions, requests to charge, and objections to the charge as given. If any one was insufficient to support a conviction, it was reversible error for the judge to submit it to the jury, unless he had required the jury to find separately as to each, as he did not. Cf. Nash v. United States, 229 U. S. 373, 33 S. Ct. 780, 57 L. Ed. 1232; Gilson v. United States, 2 Cir., 258 F. 588 (Hough, J.), certiorari
952 denied 251 U. S. 555, 40 S. Ct. 119, 64 L. Ed. 412; Minner v. United States, 10 Cir., 57 F. 2d 506. It is now impossible to say that the jury may not have convicted on the legally deficient act, if one is deficient. There is no analogy to those numerous cases in which it has been held not improper to submit a number of overt acts to the jury, although the proof established only one. Cf. Hall v. United States, 10 Cir., 109 F. 2d 976; 15 C. J. S. 1068, 1137, and cases cited. There it can be presumed upon a conviction that the jury has properly fulfilled its time-honored function of weighing the evidence and that its finding of guilt was based on the one sufficiently proved overt act. But the jury was never intended, nor, indeed, is it properly equipped, itself to determine the legal sufficiency, as distinguished from the evidentiary sufficiency, of the overt acts alleged.

Appellant challenges each of the overt acts relied on upon the ground that in and of itself, unaided by other evidence, it showed no treasonable intent. The converse of this contention is that any act which might have been done with an innocent purpose must be excluded. But such an interpretation is not warranted in the

historical background of treason. The constitutional debates show that the framers were strongly influenced by the English law of treason, see Madison, Journal of the Federal Convention, 1787, 565, 566; and it is reasonable to suppose that they intended to give Art. 3, § 3, the same scope, as well as in effect the same phraseology, as the English statute then most recently construed in the famous Lord Preston's Case, 12 How. St. Tr. 646, 1691. There the prisoner was discovered on shipboard in Kent, bound for France, with military information on the disposition of the English forces. His defense was, that no overt act was proven in the County of Middlesex, as alleged. He had, however, taken ship at Surrey Stairs in the County of 953 Middlesex; and Lord Chief Justice Holt held that such act, in prosecution of an intent to aid the enemy, was a sufficient overt act of treason. He said to Lord Preston (12 St. Tr. at 727): "My lord, as to the first matter that your lordship makes a question upon, whether there be any act of treason proved in Middlesex, that does depend upon the proof of your lordship's being concerned in the papers: for if your lordship had an intention in carrying these papers into France, which speaks a design to invade this realm, your lordship took boat in Middlesex at Surley Stairs, in prosecution of that intention, there is an overt-act in this county of Middlesex." And to the jury he said (12 St. Tr. at 740): "Ay, but gentlemen, give me leave to tell you: if you are satisfied upon this evidence that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen, and make use of the papers to that end, then every step he took in order to it, is high-treason, wherever he went: his taking water at Surrey Stairs in the county of Middlesex, will be as much high-treason, as the going a shipboard in Surrey, or being found on shipboard in Kent, where the papers were taken."

The decision establishes the proposition that a treasonable intent need not be manifested by an overt act, and not that the act itself must show the intent. The act in and of itself may be innocent; the intent with which it is committed is shown by all the surrounding circumstances, proof of which separately does not require the testimony of two witnesses. See Rex v. Vaughan, 2 Salk. 634, 91 Eng. Rep. 535, 13 St. Tr. 485, 1696, where it was held that the prisoner had committed an overt act of treason merely by cruising on the high seas for the French King, his intent, as shown thereby being to aid and assist that enemy; and compare The Case of Hugh Pine, Cro. Car. 117,

Hale P. C. 118, 79 Eng. Rep. 703, 1628, where charging the King with vice was held no treason, in absence of proof of a
954 treasonable intent, with Rex v. Charnock, 2 Salk. 631, 91 Eng. Rep. 533, 1695, where words of persuasion to kill the King were held overt acts of treason, "for the bare imagination and compassing makes the treason, and any external act that is a sufficient manifestation of that compassing and imagining is an overt act." That this has also been the rent construction of the English law, see Rex v. Lynch [1903], 1 K. B. 444, 72 L. J. K. B. 167, 20 Cox C. C. 468 (declaration and oath of allegiance to Government of South African Republic, although the basis of naturalization, held overt acts of aiding and comforting the enemy), and Rex v. Casement [1917], 1 K. B. 98, 86 L. J. K. B. 467 (Lord Chief Justice Reading in summing up to the jury, see Trial of Sir Roger Casement, 1917, ed. by Knott, p. 183; "Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object").

The early decisions in our own courts follow this construction. United States v. Lee, C. C. D. C., 26 Fed. Cas. 907, No. 15,584 (purchase of melons, an act innocent enough in itself, held sufficient as overt act; intent to deliver to enemy established by other circumstances); see Case of Fries, C. C. Pa., 9 Fed. Cas. 826, 914, No. 5,126 (per Circuit Justice Iredell: "The fact is that, when the overt act is proved by two witnesses, it is proper to go into evidence to show the course of the prisoner's conduct at other places, and the purpose for which he went to that place where the treason is laid, and if he went with a treasonable design, then the act of treason is conclusive."

In Ex parte Bollman, 4 Cranch 75, 8 U. S. 75, 2 L. Ed. 554, Mr. Chief Justice Marshall, in defining treason by levying war, held that once a body of men had assembled for the treasonable purpose, any one who performed any act in furtherance of that purpose, however minute and however remote from the scene
955 of the action, is a traitor. This decision was further explained in United States v. Burr, C. C. Va., 25 Fed. Cas. 55, No. 14693, where the sole overt act alleged was an unlawful assemblage, but the defendant was not shown to have been present. The Chief Justice instructed the jury that there was a failure of proof of the overt act; but he pointed out that the defendant might have been convicted upon allegation and proof of an act in furtherance of the design, remote and minute though it be in its bearing on the unlawful assemblage. See, also, In re Charge to Grand Jury, C. C. Mass., 30 Fed. Cas. 1049, No. 18,277. Defendant cites these cases to show that, since conviction of treason

by levying war requires an actual showing of force, by analogy conviction of treason by aiding and comforting the enemy requires an act in and of itself hostile to the United States. But a defendant to be convicted of treason by levying war need not himself have been engaged in the treasonable assemblage; but may only have aided it in some remote and minute fashion. Where treason by aiding and comforting the enemy is concerned, the requirement corresponding to a warlike assemblage must be simply that there be an enemy to aid and comfort. Any act, then, which by fair construction is in any manner in furtherance of a hostile design of such enemy is a sufficient overt act, to be proved by the testimony of two witnesses; and the purpose with which the act is done may be gathered aliunde from all the circumstances.

In the most recent case on this point, Stephen v. United States, 6 Cir., 133 F. 2d 87, certiorari denied, — U. S. —, 63 S. Ct. 858, rehearing denied, — U. S. —, 63 S. Ct. 1172, the court accepted without discussion as overt acts properly submitted to the jury that the defendant escorted an escaped German prisoner from the meeting place to his car, and that he took him to restaurants and clubs and entertained him and also concealed his identity at these places.

So, also, in United States v. Fricke, D. C. S. D. N. Y., 259 F. 673, Mayer, J., submitted to the jury as overt acts of aiding and comforting the enemy that defendant held money on deposit for a German spy and paid it out to him, and that he lied to government officials as to the identity and activities of such spy, with intent to deceive such officials. In both cases attention was directed solely to the sufficiency of proof of the acts. Had there been any question in either case of their legal sufficiency, we cannot but believe that the court would have raised it, for where the death penalty is applicable, a court will notice all possible errors even though not properly raised. Stephan v. United States, supra, 133 F. 2d at page 96. The Stephan case was before the Supreme Court four times—once on the petition for certiorari, — U. S. —, 63 S. Ct. 858, once on petition for a stay of execution, which was granted, — U. S. —, 63 S. Ct. 984, once on the petition for a rehearing, — U. S. —, 63 S. Ct. 1172, and once on application for allowance of an appeal direct from the district court, which was denied, — U. S. —, 63 S. Ct. 1135. In the latter case the Court observed in a per curiam opinion that it had rejected the petition for certiorari "after careful consideration of the case." In the light of this background, we do not feel we should hold to the contrary because of a dictum, much pressed upon us, as it was on the court in the Stephan case, in United States v. Robinson, D. C. S. D. N. Y., 259

956

F. 685, even if, as is doubtful, the statement relied on is against the views here stated.[3]

957 Any interpretation of Art. 3, § 3, which would require the overt act itself to demonstrate the treasonable intent would erect a requirement of quantity of proof into a limitation on the crime itself, rendering it as a practical matter almost nonexistent. One would be hard put to it to think of an act, short of openly joining the armed forces of the enemy,[4] which would surely show treason if resort cannot be had to background evidence of intent. And if such separation of proof into component parts is necessary, it would follow that the overt act would have to be proved first and the jury then pass upon the sufficiency of the intent thereby shown before any other evidence of intent be admitted. See Case of Fries, supra, 9 Fed. Cas. at page 916. For intent is always for the jury, and cannot be adjudged by the court in passing on the legal sufficiency of the overt act. In effect the overt act would then have to comprehend the whole treason, and proof aliunde of intent would be superfluous. This would mean an extension of the scope of the two-witness rule beyond anything heretofore known in its varied history, not to speak of a retrogression in the progressive emphasis on the quality of the witnesses to a crime, rather than on their numerical quantity. See 9 Holdsworth's History of English Law, 1926, 203–211; 7

958 Wigmore on Evidence, 3d Ed. 1940, 241–273. We believe in short that no more need be laid for an overt act of treason than for an overt act of conspiracy, which has never been thought of as itself establishing the unlawful scheme. The requirement will then be, as it is in terms, one of limitation of the number of witnesses to it, not some difference in kind applicable to this offense. Hence we hold the overt acts relied on were suf-

[3] In that case Judge Learned Hand was actually passing on a point discussed later in this opinion; but before considering it, he expressed grave doubt of certain acts charged "which do not openly manifest any treason," and questioned whether the prosecution could charge as an overt act "a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent." This language does, of course, state the problem, albeit in abstract and general terms; just how far he would have gone, if pressed to it, in applying his thought is not clear. Appellant says one of the acts he questioned (though there is some ambiguity in his referent), charged meeting and conferring with one O'Leary. But O'Leary was not a saboteur from an enemy submarine; he seems at most a person interested in enlisting German support for the cause of Irish freedom. Also Judge Hand held "good as a pleading under any rule" a charge that the defendant embarked from Rotterdam bound for New York, carrying with him messages from the German Government with intent to convey them to certain German agents, though it would seem that he expressed disapproval of the sufficiency of a charge of defendant's arrival in New York with these same messages and the same intent. If anything, the latter would seem more decisive than the former, though to either proof of the intent appears requisite.

[4] The government points out that even this act would not necessarily show treason because of its possible use by an American spy.

ficient to be submitted to the jury, even though they perhaps may have appeared as innocent on their face.

Something more should be said as to overt act 10, in view of appellant's reliance particularly upon United States v. Leiner, Cr. No. 113-120, D. C. S. D. N. Y., 1943, Clancy, J., where the court ruled out as overt acts misstatements of a prisoner to his captor upon the grounds that the prisoner knew the enemy allegedly aided had already been apprehended and beyond aid, and that the misstatements were such as to exculpate himself. Appellant urges that these conditions apply here. But they are at best indicia of intent, which is for the jury. And in any event, it is a non sequitur to suppose that because an enemy has been apprehended no aid can be extended him by misstatements as to his identity and activities. Certainly they may thwart his conviction and speed his release to commit further depredations. So, also, any general exception for misstatements tending to exculpate the prisoner would be somewhat at variance with the settled notion that a conviction of treason is proper even though the defendant is moved to commit the treason by pecuniary motives. In re Charge to Grand Jury, C. C. S. D. N. Y., 30 Fed. Cas. 1032, No. 18,270; In re Charge to Grand Jury, C. C. S. D. Ohio, 30 Fed. Cas. 1036, No. 18,272. And even if we should assume an immunity where facts are misstated without thought of aiding the enemy and solely for self-preservation, the case here is otherwise. Defendant claims that he lied as to Thiel's
959 identity to conceal Thiel's violation of the draft law. But he continued to deny Thiel's return to Germany in 1941 and his ownership of the money in the deposit box even after he was informed that the FBI knew his identity. And he makes no claim that this was to save himself.

Each of the overt acts was sufficiently proved by the testimony of two witnesses. While the two phases of overt act 2 were observed by different sets of witnesses, the discussion in the Twin Oaks Inn by Agents Willis and Rice, and the further discussion in Thompson's Cafeteria by Agents Rice and Stanley, we perceive no reason in policy or law to require the same two witnesses to the whole overt act. If the policy behind the two-witness rule is to protect the accused fully against conviction upon the false testimony of one hostile witness, certainly this multiplication of witnesses will still better insure the result. There is nothing contra in the holding in United States v. Robinson, supra, 259 F. at page 694, that "it is necessary to produce two direct witnesses to the whole overt act," for this was directed at the attempted proof of separable parts of the overt act by different witnesses, one for each part. Judge Learned Hand, however, went on to say, "It may be possible to piece bits together

of the overt act, but, if so, each bit must have the support of two oaths; on that I say nothing." See, also, 7 Wigmore on Evidence, 3d Ed. 1940, § 2038, page 271.

Nor is it significant that some of the witnesses viewed the conferences for but a few minutes, though the conferences actually continued for a total of some three hours. The indictment charged simply that appellant conferred, treated, and counseled "for a period of time," first with Thiel and Kerling and then with Thiel alone. Under the circumstances and in the light of the evidence as to intent, proof for a short period of time is adequate.

960 Furthermore, overt act 2 is not insufficient because only one witness testified as to the last clause that the $3,500 (which appellant falsely claimed he owned) was kept by him in a safe deposit box "because he considered it safer there than in his savings account in said bank." The substance of the act was that appellant lied to government officials to cover up for Thiel. It was proved in all important respects by two witnesses. By analogy to those cases in which proof of but one of the overt acts of an indictment has been held sufficient, we see no reason why we should not disregard the failure to establish this allegation of overt act 10, in view of the other proved allegations; it is now mere surplusage. The jury could not conceivably have relied upon it solely to establish the act, for it presupposed appellant's claim of ownership, which was in fact proved by two witnesses.

Other errors assigned deal with the admission of testimony. Shortly after the opening of the trial the government introduced a mass of testimony as to the background and training of the saboteurs, the method which they used to enter the country, and the wide variety of tools of destruction which they brought with them. Appellant's counsel objected after a time to a continuance of this line of testimony, on the ground that it was unnecessarily prejudicial and inflammatory, especially since he conceded that the saboteurs were enemies of the United States. The objection was overruled. All told, some 75 pages of the testimony, which in toto comprises over 700 pages in the record, were devoted to this topic. We are not convinced, however, that the district court thereby abused its discretion. It was essential that the government prove that Thiel and Kerling were enemies of the United States, and it could not safely rely for this on any concession by appellant's counsel.

961 During the trial the Government's witness Powers, a "minute man" selling war bonds and stamps, was also allowed to testify over objection that when he called at appellant's apartment on June 22, 1942—the day appellant met Thiel—appellant had said he was not interested in buying even a war

stamp and had shut the door. While we may grant appellant's contention that this did not of itself show a treasonable intent, it was certainly evidence for the jury as to appellant's state of mind at this crucial time. It may be noted that Norma Kopp later testified that appellant had told her he had thrown the minute man out, and that she had originally thought that this was the cause of appellant's arrest by the F. B. I.; and further that appellant himself testified that he related the incident to Thiel, who said: "Well, why did you do that? Don't you think it is very dangerous to be unpatriotic today?" These were normal reactions to the incident; in any event, we think the jury was entitled to draw its own conclusions from it.

On cross examination appellant was asked whether he was ever particularly interested in the law of treason. When he answered in the negative, the prosecution introduced in evidence a copy of the Constitution taken from his room. On it the section concerning treason was bracketed in ink. Appellant admitted he had done this about a year and a half previously, which would be about March, 1941, the time Thiel left for Germany. At least five other unrelated provisions were also marked. The exhibit was properly admitted to impeach appellant's answer and to show his state of mind at least as of the time he marked the copy, which under the circumstances was not too remote to be relevant to the events of June, 1942.

Appellant was also required on cross examination to answer the question, allowed over objection, whether he had not received a letter in 1941 from his nephew Norbert in Germany warn-
962 ing him that his letters discussing the United States were so unfriendly that Norbert's father feared he would be placed on the black list. Of course, these expressions of opinion could not properly bind appellant; and the objection might wisely have been sustained. But the district court has a wide discretion to admit testimony on cross examination; and since the testimony prior to the objectionable question shows that it was intended to refresh appellant's recollection as to whether he had written any letters of a nature unfriendly to the United States, other than that to Thiel on November 25, 1941, we cannot say that there was here an abuse of the district court's discretion or grounds for mistrial. In any event, the ruling was not so prejudicial as to outweigh all the other circumstances requiring an affirmance.

Affirmed.

963 In the United States Circuit Court of Appeals, Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY CRAMER, DEFENDANT-APPELLANT

Judgment

Sept. 7, 1943.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

By A. M. BELL,
Deputy Clerk.

965 [Clerk's certificate to foregoing transcript omitted in printing.]

966 Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

967 Supreme Court of the United States

Order granting motion for leave to proceed in forma pauperis

November 8, 1943

On consideration of the motion for leave to proceed herein in forma pauperis

It is ordered by this Court that the said motion be, and the same is hereby, granted. The Court directs that the expense of printing the record be paid by the United States pursuant to 28 U. S. C., Sec. 832.

[Endorsement on cover:] In forma pauperis. Enter Harold R. Medina. File No. 47899. U. S. Circuit Court of Appeals, Second Circuit. Term No. 406. Anthony Cramer, Petitioner vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 30, 1943. Term No. 406 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 406

ANTHONY CRAMER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

BRIEF FOR PETITIONER.

HAROLD R. MEDINA,
Counsel for Petitioner.
JOHN McKIM MINTON, JR.,
RICHARD T. DAVIS,
On Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 406

ANTHONY CRAMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

BRIEF FOR PETITIONER.

I.

The Opinion of the Court Below.

On December 2nd, 1942, a judgment was entered upon the verdict of the jury in the United States District Court for the Southern District of New York convicting petitioner of the crime of treason under the following statute:

"*Treason.* Whoever, owing allegiance to the United States, levies war against them or adheres to their

enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." (35 *Stat.* 1088, 18 *U. S. C.* § 1).

The petitioner was sentenced to forty-five years in prison and a $10,000 fine (R. 453).

An appeal from the judgment was taken to the Circuit Court of Appeals for the Second Circuit which affirmed the judgment of the District Court on September 7th, 1943 (R. 475-488). The opinion of the Circuit Court appears at 137 F. (2d) 888.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code as amended by the Act of February 13, 1925, 28 *U. S. C.* § 347-a. Petition for writ of certiorari was filed on September 30, 1943 and was granted on November 8th, 1943. The present proceedings are *in forma pauperis* pursuant to order of this Court, also made on November 8, 1943, the undersigned having been assigned by Hon. John C. Knox, D. J., as counsel to defend.

III.

Statement of the Case.

This case is a sequel to the arrest, and to the trial and conviction before a Military Court in Washington, of the eight German saboteurs who were landed from submarines at two different points on the eastern shore of the United States in the month of June, 1942. These eight saboteurs made their entry into this country in two groups, consisting of four men in each group. The proof showed that of the four men who landed at Ponte Vedra Beach near Jacksonville, Florida, the petitioner had contact with two, namely, Werner Thiel and Edward John Kerling.

In substance, the indictment alleges that Werner Thiel and Edward John Kerling were enemies of the United States who came to this country for the purpose of committing various acts of sabotage, including the destruction of war materials and utilities, the recruiting of persons to assist them in their hostile enterprises, the securing of information concerning the defense of the United States, the making and spreading of false reports within the United States, etc.

It is further alleged that the petitioner Anthony Cramer, being a citizen of the United States and owing allegiance thereto, traitorously and treasonably adhered to Thiel and Kerling in aiding and advising them; in receiving and safeguarding property of Thiel; in carrying out requests and instructions of Thiel to establish contact and communication with others; in giving agents of the United States false information concerning the said Thiel with intent to conceal his identity and his purpose, etc.

Although the indictment charged the commission of ten overt acts we shall, in the interests of brevity, summarize only those three submitted to the jury, namely, Nos. 1, 2 and 10. We omit the recital (common to all) "for the purpose of giving and with intent to give aid and comfort to said enemies".

1. That on June 23rd, 1942, the petitioner met with Thiel and Kerling at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City of New York, "and did confer, treat and counsel" with the said Thiel and Kerling for a period of time.

2. That on June 23rd, 1942 the petitioner "did accompany, confer, treat and counsel" with Thiel for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street and at Thompson's Cafeteria on 42nd Street, both in the City of New York.

10. That on June 27th, 1942, the petitioner gave false information and made false statements regarding Werner Thiel to Special Agents Willis and Ostholthoff of the Federal Bureau of Investigation as follows: (1) that Werner Thiel's name was Bill Thomas; (2) that from March, 1941, until June, 1942, Thiel had been working in a factory on the west coast of the United States; (3) that during the aforesaid period Werner Thiel had not been out of the United States; (4) that the money belt given him by Werner Thiel in June, 1942 had contained only a couple of hundred dollars which Werner Thiel had owed him; and (5) that the $3,500 in the petitioner's safe deposit box at the Corn Exchange Bank, on East 86th Street, belonged to him and had been obtained by him from the sale of securities because he considered it safer there than in his savings account in said bank; that the foregoing false information was given for the purpose of concealing the identity and mission of the said Werner Thiel.

The full statement of the evidence contained in the opinion of Clark, C. J., makes it unnecessary to repeat the facts and circumstances.

The issues of law revolved about the proof relative to the overt acts, to which we shall presently advert. The factual issue was clean-cut and substantial. There was no dispute that the petitioner actually, in the sense of physically, performed the acts alleged in the indictment. In other words, the petitioner did talk with Thiel and Kerling, he did take the money belt containing $3,500 from Thiel, he did place the greater part of this money in his safe deposit box, he did write a letter to Norma Kopp and so forth. And his counsel so conceded in his opening to the jury (R. 18).

The crucial issue was whether, in performing these acts, the petitioner entertained that traitorous intent which is

indispensable to the establishment of the crime. Upon the basis of the entire record, it can be confidently asserted that this question of the petitioner's intent remained close throughout the trial. In imposing sentence upon the petitioner, the District Judge made the following significant comment (R. 453):

> "From the evidence it appears that Cramer had no more guilty knowledge of any subversive purposes on the part of Thiel or Kerling than a vague idea that they came here for the purpose of organizing pro-German propaganda and agitation. If there were any proof that they had confided in him what their real purposes were, or that he knew or believed what they really were, I should not hesitate to impose the death penalty."

In this state of the evidence it is claimed that the alleged errors in matters of proof were highly prejudicial.

The United States Attorney expressly disclaimed any prearrangement between petitioner and the eight saboteurs but stated flatly that the latter came to this country "without prior notification and without prearrangement of any kind or character" (R. 10), a position which was reiterated later on in the trial to the effect "so far as we know there was no prearrangement or prior notification with respect to Thiel being aided and comforted by the defendant Cramer" (R. 115).

With reference to the overt acts, there was tried shortly after the trial of this case a charge of treason against one Leiner before Clancy, D. J., also in the United States District Court for the Southern District of New York. The situation relative to the overt acts was substantially identical. In the *Leiner* case Judge Clancy directed a verdict for the defendant at the close of the entire case and his opinion, orally rendered, in connection with the granting of that motion is set forth as an Appendix to this brief.

IV.

Specification of Errors

The United States Circuit Court of Appeals erred in affirming the judgment of the District Court for the following reasons:

1. Petitioner was denied a fair trial in consequence of grave and prejudicial errors committed by the District Court in receiving numerous items of improper evidence.

2. The District Court erred in submitting to the jury Overt Acts 1, 2 and 10 on the ground that such acts were legally insufficient in that they did not openly manifest treason.

3. Overt Act 10 should not have been submitted to the jury for the additional reason that petitioner's statements, which form the substance of that act, were made by him subsequent to the time he was taken into custody but prior to the time of his arraignment.

4. (A) The Court below erred in submitting to the jury Overt Acts 2 and 10 on the further ground that the allegations thereof had not been proved by the testimony of two witnesses; (B) And the court erred in charging the jury with respect to the requirement of proof by two witnesses to each overt act.

5. The evidence as a whole failed to make out a case against petitioner and the motion for the direction of a verdict in his favor should have been granted.

V.

ARGUMENT.

First Point.

Petitioner was denied a fair trial in consequence of the grave, and prejudicial errors committed by the District Court in receiving numerous items of improper evidence.

Intent was the issue. It was close. The petitioner had no previous record of disloyal acts or utterances. Knowledge, as a fact, and as distinguished from mere inference was predicated entirely upon two alleged admissions attributed to the petitioner himself.

There were numerous circumstances, both positive and negative, which had to be considered as, for example, the conceded fact that there was no prearrangement between Thiel and petitioner; that petitioner, neither by virtue of the job which he held nor any knowledge which he could have had, was in any position to furnish any information of military value to Thiel and Kerling; that all his talks with Thiel and Kerling, and Thiel alone, took place in public restaurants; that, as bearing upon the taking of the money belt, Thiel did owe petitioner approximately $200; that Norma Kopp was admittedly Thiel's fiancee and no agent of the German Reich; that, unless the placing of the money belt in the shoe box be regarded as a "concealment", nothing whatever was found concealed in petitioner's room when it was searched (R. 100-101); that petitioner agreed freely to the search of his room, his safe deposit box and the taking of his letters; his previous spotless record; and the very evident fact, as shown by his entire conduct after his arrest, that he had no realization that what he had done might have serious consequences.

A.

COPY OF THE UNITED STATES CONSTITUTION.

On November 9th, 1936, petitioner became a citizen of the United States (R. 29; Govt's Exh. 2, R. 29). The oath of allegiance which he then signed contained the usual clauses relative to the Constitution of the United States (R. 250).

Government's Exhibit 55 (R. 309) is a copy of page 21 of the issue of the New York *Times* for Friday, September 17th, 1937. It contains the Constitution of the United States in its entirety. The petitioner could not remember just how it came into his possession but in his talks with the F. B. I. men he fixed the time as some time in the early part of the year 1941 (R. 313, 111). He kept this copy of the Constitution in his room, evidently reading it over from time to time, and he placed a number of ink lines alongside of or under the following provisions of the Constitution:

1. That portion of Article 1, Section 7, which provides that if any bill passed by the Congress shall not be returned by the President within ten days after having been presented to him, the same shall be a law;

2. That portion of Article 1, Section 8, which provides that Congress shall have power to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water;

3. That portion of Article 1, Section 9, which provides that no bill of attainder or ex post facto law should be passed;

4. That portion of Article 1, Section 9, which provides that no title of nobility shall be granted by the United States;

5. That portion of Article II, Section 1, which sets forth the oath which the President shall take before entering upon the execution of his office;

6. Article III, Section 3, which defines treason against the United States, provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act and further provides that Congress shall have power to declare the punishment of treason.

After the trial court had received the exhibit in evidence, petitioner testified that he had no particular reason for marking the paragraph relating to the law of treason and that he had the habit whenever he read something that struck his imagination or curiosity to mark it (R. 314).

When this document was offered in evidence, serious objection was raised, the jury were excused during the colloquy with the Court, and the objections of counsel appear at some length (R. 304-310). The objections stressed the contention that the exhibit was "of absolutely no probative value" on any of the issues (R. 305); and that, even if it might be deemed to have some slight, remote bearing, this was evidence of such a character as naturally to arouse the feelings and emotions of the jury so that it would have upon the jury an effect out of all proportion to its true judicial worth (R. 305-306). When it is realized that the trial was held in the midst of war, when all minds are naturally in a state of excitement and peculiarly susceptible to irrelevant and prejudicial proof, particularly in a case of treason, it is hard to imagine evidence of less real probative value and of greater emotional appeal.

The rule invoked by counsel for the petitioner is stated as follows in Wigmore on *Evidence* (3rd Ed.), § 1904:

> "Circumstantial evidence, concededly relevant, may nevertheless be excluded by reason of the general principle (*ante*, § 1863) that the probative usefulness

> of the evidence is more than counter-balanced by its disadvantageous effects in confusing the issues before the jury, or in creating an undue prejudice in excess of its legitimate probative weight. In either case, its net effect is to divert the jury from a clear study of the exact purport and effect of the evidence, and thus to obscure and suppress the truth rather than to reveal it."

The ink lines on Government's Exhibit 55 were placed alongside of a substantial number of provisions of the Constitution and they were all of that strange, unusual and peculiar character which might well seem curious to a person who had just undertaken the duties of citizenship and who, pursuant to his oath of allegiance, was informing himself further as to the contents of the Constitution.

The ink lines had been placed upon the paper at least ten months before war broke out between this country and Germany and, as previously herein stated, it was conceded by the Government that there was no proof of any prearrangement between Thiel and petitioner (R. 115). This exhibit should have been excluded on the ground of remoteness alone. (*People* v. *Razezicz*, 206 N. Y. 249 (1912); *People* v. *Harris*, 209 N. Y. 70 (1913).)

The ostensible reason for offering this exhibit was to impeach the petitioner's credibility. The supposed foundation was sought to be laid in the following question and answer (R. 304):

> "Q. Isn't it a fact, sir, that at one time you were particularly interested in the law of treason? A. No, sir, I have never been interested in that."

The opinion of Clark, C. J., seems to indicate that the Circuit Court was of the view that the exhibit tended to "impeach appellant's answer". It is respectfully submitted that it does not and that the question thus put

to petitioner was used as a mere device to accomplish by indirection what could not fairly and legally be done directly. It was known by everyone connected with the case that petitioner had admitted and had at no time denied having the paper in his possession and having made the marks upon it. It is to be borne in mind that petitioner did not have a perfect command of English and was frequently confused, particularly by words involving mental operations and characterizations.

B.

THE "WARNING" IN NORBERT'S LETTER.

The following took place on the cross-examination of the petitioner (R. 329-330):

"Q. Now, sir, during the year 1941 didn't you receive letters from your nephew Norbert? A. Yes sir.

Q. Now isn't it the fact, sir, that Norbert's father—that was your brother, wasn't it? A. That is right.

Q. Through Norbert warned you that your letters discussed the United States in such an unfriendly fashion that Norbert's father feared that you would be put on the black list, because according to him the letters went through an American censorship?

Mr. Medina: I object to that question as improper, and that the very wording of the question is such that I move for a mistrial.

The Court: Motion denied.

Mr. Medina: What is your Honor's ruling?

The Court: The motion is denied.

Mr. Medina: Exception. What is your Honor's ruling on my objection?

The Court: Overruled.

Mr. Medina: Exception. These are letters from someone else, and I claim they are not binding upon the defendant. Your Honor realizes that, I take it.

By Mr. Correa:

Q. Do you have the question? A. Yes sir. If there was any purpose behind it, I have been trying to show that we still have freedom of the press and thought in the United States.

Mr. Correa: I move to strike the answer, and ask that the question be read and the witness be directed to answer it responsively.

The Court (To witness): Can't you answer that directly? Answer that question directly.

The Witness: Whether it was hostile or whether it was friendly or——

Mr. Medina: No, the question is whether you got letters which said that.

The Witness: Well, I have received a letter from my nephew Norbert which mentions that, I admit that.

Mr. Medina: I move to strike out the answer upon the grounds on which I objected to the question.

The Court: The motion is denied.

Mr. Medina: Exception."

The error in the foregoing ruling seems too clear to call for any extended argument. The letter to which the question of the District Attorney referred was supposedly written by the petitioner's nephew in Germany. The alleged "warning" was supposed to have emanated from the petitioner's brother and to have been communicated to the petitioner through the letter from the nephew Norbert. The letter, of course, was not in evidence and was not admissible on any theory. The alleged statements of petitioner's brother or the petitioner's nephew were obviously not binding upon the petitioner in any respect.

The vice that lay in the question is patent. It assumed the writing by petitioner of letters "unfriendly" to this country, so "unfriendly" that the petitioner's brother felt compelled to "warn" him that he might be put on the "black list". This was rank assumption. There was no evidence of letters written by the petitioner to his brother

which spoke of the United States in an "unfriendly" fashion. The only letter offered in evidence from petitioner to his brother was Government's Exhibit 69 (R. 118), which was written before the attack on Pearl Harbor and which evidences nothing in the way of an "unfriendly" attitude towards the United States.

In making the assumption that the petitioner had written letters, "unfriendly" to the United States, to his brother, the question objected to went to the very heart of the issue of intent. The assumption in the question was, in effect, a substitution for evidence. The question involved, moreover, elements of pure speculation. What the petitioner's brother might have thought were "unfriendly" sentiments, might not have been "unfriendly" at all. Living under a totalitarian government, the petitioner's brother might well have thought that frank criticism of American political leaders, such as the petitioner voiced, for example, in his letter to Thiel (Govt's Exh. 68, R. 118), might get the petitioner into trouble, not realizing that one of the rights which the petitioner had in this country, as an American citizen, was to do that very thing.

Thus, we say, that there were elements of pure speculation in the question. What the petitioner's brother might have regarded as "unfriendly" sentiments towards the United States was anybody's guess and it is clear that, in no event, was the petitioner bound by any conclusion reached by his brother on that subject.

If is difficult to see how this ruling could have failed to prejudice petitioner. The Circuit Court appears to concede that the ruling was erroneous (R. 488) but refers to the wide discretion relative to cross-examination in general and intimates that the question may have been intended to refresh petitioner's recollection as to whether he had written any letters of a nature unfriendly to the United States. There seems to be no justification in the record for this view.

C.

THE EXCESSIVE MASS OF EVIDENCE TO ESTABLISH THAT THIEL AND KERLING WERE ENEMIES OF THE UNITED STATES.

One of the essential allegations of the indictment, of course, was that Werner Thiel and Edward John Kerling were enemies of the United States who had come into this country to commit various acts hurtful to the war effort of the United States.

With respect to these allegations, counsel for the petitioner in his opening to the jury made the following blanket concession (R. 17):

> "The first one, as Mr. Correa has indicated, is that the Government must show that these persons, Thiel and Kerling, with whom Mr. Cramer is alleged to have had dealings, were really enemy spies here to do the work of the German Government. They must show that, of course. And I say to you gentlemen, and I admit in the most formal way for this record that the defendant admits that that is so. That is not going to be an issue in this case. It is not going to be a real issue now, of course, because the defendant does not concede that he knew that to be so. That is something different. But as far as that fact is concerned of Thiel and Kerling being German spies who came over here to do damage to our country, that is not going to be an issue in this case because that is so. It is admitted to be so."

Elaborating upon this concession, counsel for the petitioner further stated in his opening (R. 18):

> "Furthermore, I believe that if we have a great many witnesses called and a whole lot of exhibits brought in on that particular issue, that are copied from others Cramer had nothing to do with at all, I say that would be prejudicial to him and I intend to object to cumulative evidence of that kind coming in. I want to remove

all issues from the case, as far as I can, because we all know these people really were spies that came here as saboteurs to do sabotage. Now that is that."

Shortly after the opening of the trial, the Government called to the stand Ernest Peter Burger, one of the eight saboteurs who landed from submarines on the shores of this country in June of 1942. Burger was one of the group that landed on the Long Island shore on the night of June 13th, 1942 (R. 42). Burger told the whole story, more than sufficient to establish beyond peradventure of doubt that Werner Thiel and Edward John Kerling were saboteurs and enemies of the United States. He testified to the attendance of all eight saboteurs at a special school for sabotage training in Brandenburg, outside of Berlin (R. 31). He told how they were instructed in the use of chemical combinations, incendiaries and explosives (R. 31). He identified photographs of all eight saboteurs, including Werner Thiel and Edward John Kerling (R. 31-32). He told how they visited certain aluminum plants as part of their training (R. 32). He related how they received their equipment and instructions, including explosives and uniforms (R. 33). He identified a considerable collection of photographs of their equipment, including explosives, time device fuses, detonators, igniters, uniforms, caps, etc. (Govt's Exhs. 11-27 inc., R. 45).

In the course of the testimony of this witness, counsel for the petitioner took occasion to remind the Court that while he did not deny the relevancy of the testimony being offered and did not claim, up to that point, that there had been any undue elaboration, his position, nevertheless, was that he would object to "the repetition, the rubbing of it in, and the elaboration of it, in view of our concession" (R. 38).

Burger continued, identifying the shovels which they were to use in burying the explosives after their arrival on the shores of this country (R. 39). He testified to the num-

ber of boxes of explosives which each group had. He told of their departure by submarine from Lorient on the French coast (R. 40). He testified to their receiving final instructions and money which was given to them in money belts, containing approximately $5,000 each (R. 40-41). Burger identified his money belt, as well as Thiel's and Kerling's money belts (R. 41). He told how he attended at the departure of the group that left for Florida, including Thiel and Kerling (R. 42). He went on to testify as to when his group, the Long Island group, departed, the circumstances of their landing and what they did when they reached the Long Island shore (R. 42). He concluded by telling of his arrest and subsequent trial in Washington (R. 43).

The foregoing, in barest outline, will give the Court an idea of the scope and character of Burger's testimony.

In the course of the testimony of the next witness, Special Agent Parsons of the F. B. I., Government's Exhibits 11 to 27, consisting of photographs of the various equipment to be used by the saboteurs, were offered in evidence (R. 45). At that point counsel for the petitioner renewed his objection as follows (R. 46):

> . . . . specifically upon the ground that in view of the concession made here, and in view of the proof by the witness Burger, which would seem to cover the field thoroughly and comprehensively, we believe that evidence as to such details as appear in these photographs and other similar evidence that may be produced a little later, will have an amount of effect out of all proportion to its true judicial worth and will be prejudicial to the defendant; it will confuse the issues and it will get, inevitably, the minds of the jurors away from what is the central and simple issue, and is bound, particularly when accumulated here, to do so."

The objection of counsel for the petitioner was overruled

and the exhibits received in evidence. Petitioner's exception was noted on the record (R. 47).

Parsons continued with detailed testimony of the chemical and mechanical construction of the various explosive devices (R. 48-52 inc.), counsel for the petitioner being given an objection to "this entire line" of testimony (R. 49).

There followed a succession of witnesses to prove that Thiel and Kerling had stopped at certain hotels in Jacksonville, Florida (R. 61-66 inc.)

The amount of cumulative evidence which may be received in proof of any particular issue is, of course, in the discretion of the trial court. We contend that the learned trial court was guilty of an abuse of discretion in permitting the Government to adduce an excessive amount of evidence to substantiate the allegation that Thiel and Kerling were enemies of the United States. It is true that in order to establish that the petitioner was guilty of treason it was incumbent upon the Government to prove, first, that Thiel and Kerling were enemies of the United States. But the latter, while a basic issue, was likewise a subsidiary issue. The dominant issue was whether the petitioner was a traitor. Counsel for the petitioner, in effect, removed the subsidiary issue from the case by his broad concession in his opening to the jury (R. 17).

While it may be true that the Government was not required to rest entirely upon the concession made by counsel, the Government was not justified in deliberately accumulating evidence to a point where the petitioner became hopelessly submerged in circumstances which, as to him, were wholly unconnected and collateral. The proof as to the nature and extent of the explosives and explosive devices was particularly prejudicial. There was never any showing, or even claim, that the petitioner had anything

to do with these (R. 46). In this connection, we refer to the statement of the trial court in sentencing the petitioner (R. 452-453):

> "It does not appear that this defendant Cramer was aware that Thiel and Kerling were in possession of explosives or other means for destroying factories and property in the United States, or planned to do that."

Second Point

The District Court erred in submitting to the jury Overt Acts 1, 2 and 10 on the ground that such acts were legally insufficient in that they did not openly manifest treason.

I.

This point was argued *in extenso* on the motion by defendant to direct a verdict at the close of the entire case (R. 367-371).

If any one of these overt acts was insufficient to support a conviction, it was reversible error for the Judge to submit it to the jury inasmuch as the jury was not required to find separately as to each. *United States* v. *Cramer*, 137 F. (2d) 888, 893 (C. C. A. 2d, 1943) and cases there cited.

The alleged overt acts submitted to the jury read as follows:

> "1. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did meet with Werner Thiel and Edward John Kerling, enemies of the United States, at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City and State of New York, and did confer, treat, and counsel with said Werner Thiel and Edward John Kerling for a period of time for the purpose of giving aid with intent to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling.

"2. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues, both in the City and State of New York, for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel.

"10. Anthony Cramer, the defendant herein, on or about June 27, 1943, at the Southern District of New York and within the jurisdiction of this Court, did give false information and make false statements regarding Werner Thiel, an enemy of the United States, to officers and agents of the United States, to wit, John G. Willis and A. E. Ostholthoff, Special Agents of the Federal Bureau of Investigation, Department of Justice, then and there engaged for and on behalf of the United States in investigating said Werner Thiel and his activities in the United States, said false information and false statements being in substance as follows, to wit: (1) That Werner Thiel's name was 'Bill Thomas'; (2) That from March 1941, until June 1942, Werner Thiel had been working in a factory on the West Coast of the United States; (3) That during the aforesaid period, Werner Thiel had not been out of the United States; (4) That the money belt given him by Werner Thiel in June 1942, had contained only a couple of hundred dollars which Werner Thiel had owed him; (5) That $3,500 in his safe deposit box at the Corn Exchange Bank Trust Company, 86th Street Branch, belonged to him and to no one else, had been obtained by him from the sale of his securities, and was kept by him in a safe deposit box because he considered it safer there than in his savings account at said bank; the aforesaid false information and false statements being given and made for the purpose of concealing the identity and mission of said

enemy, Werner Thiel, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel."

With respect to the alleged Overt Acts 1 and 2, it is unnecessary for us to consider whether these two overt acts, according to their precise terminology, are legally sufficient. Since there was no proof whatever offered by the Government concerning the subject matter of the conversations had between the petitioner and Thiel and Kerling, and Thiel alone, it necessarily follows that there was no proof of the overt acts in so far as they alleged that the defendant "did treat and counsel" with Thiel and Kerling, and Thiel alone. The furthest that the Government's proof went was to establish that the petitioner "did meet * * * and did confer" so that, for the purpose of testing the sufficiency of these overt acts, as overt acts, they may be treated as alleging simply that the petitioner, on the occasions specified, met and talked with Thiel and Kerling, or Thiel alone.

We contend that, as modified by the proof, Overt Acts 1, 2 and 10 are clearly insufficient as a matter of law in that they do not, as of themselves, and unaided by any other evidence, manifest treason.

The provision in the *Constitution of the United States* concerning treason:

> "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." (Article III, Section 3)

and the statute based thereon (35 Stat. 1088, 18 *U.S.C.* § 1) have their substantive source in the English statute, 25 Edward III [1351] of which Sir Edward Coke wrote, "For except it be Magna Charta, no other act of parliament hath had more honour given unto it by the king, lords spirituall and temporall, and the commons of the realme for the time being in full parliament, then this act concerning treason hath had." (Coke, *The Third Part of the Institutes of the Laws of England*, Cap. I, 1, 2.)

This statute set forth seven types of treason, the most important of which were compassing or imagining the death of the king, queen, or prince, levying war against the king, and adhering to the king's enemies within the land or without. That the treason be manifested by an overt act was required only with respect to the treasons of compassing the death and adhering to enemies, inasmuch as the other treasons (levying war, counterfeiting the king's seal or coin, killing the chancellor, treasurer, etc., violating the king's consort etc.) could be committed only by doing the very act which was the treason.

25 Edward III did not require that the charge of treason be substantiated by two accusers. This was added to the law of England by the statutes 1 Edward VI, c. 12, § 22 [1547] and 5, 6 Edward VI, C. 11, § 9 [1551-1552]. While there was some doubt as to the effect on this requirement of the statute 1, 2, Philip and Mary, C. 10, § 6 [1554], which provided that all trials of treason should be according to the course of the common law, (cf. Wigmore, *Evidence*, 2036), it was finally settled by the statute, 7 William III, § 2, [1695], that no person should be indicted, tried or attainted of high treason except upon the oaths and testimony of two lawful witnesses, unless the party shall willingly, without violence, in open court confess the same, or shall stand mute or refuse to plead, or shall peremptorily challenge above the number of thirty five of the jury. This

statute, however, did not require that there be two witnesses to the same overt act, but only that either both of them testify to the same overt act, or one of them to one, and the other of them to another overt act of the same treason.

It is not to be inferred that 25 Edward III was the only English statute setting forth the substantive law of treason. There were many statutes passed between 1351 and the adoption of our Constitution defining the crime of treason. But 25 Edward III was the cornerstone of the English law of treason and it was that statute which our Constitutional Convention had in mind in defining the law of treason for this country.

The original draft of the Constitution and the Constitution as adopted contained only two of the seven types of treason set forth by 25 Edward III, i. e., levying war and adhering to enemies. Several members of the Convention (Mr. Madison and Mr. Mason) thought the definition of treason too narrow and favored provisions more in conformity with 25 Edward III (cf. Elliott, *Debates on the Adoption of the Federal Constitution*, Vol. V, p. 447), and at the suggestion of Mr. Randolph and Mr. Mason, the phrase "giving them aid and comfort" was inserted after the phrase "adhering to their enemies", to that extent conforming the Constitutional provision to 25 Edward III (Elliott, *supra*, pp. 448, 450).

As for the requirement of proof, the original draft of the Constitution followed the English statute 5, 6, Edward VI in requiring only that no person should be convicted except on the testimony of two witnesses. On Dr. Franklin's motion, however, the phrase "to the same overt act" was inserted after the words "two witnesses", despite the warning of Mr. Wilson that "Treason may sometimes be practiced in such a manner as to render proof extremely difficult, as in traitorous correspondence with an enemy" (Elliott, *supra*, p. 449). Thus on the matter of proof of overt acts the provision of the Constitution departed from

the English law as embodied in 7 William III. But it is abundantly clear, however, that the concept of overt acts of treason set forth in the Constitution was the same concept as had for centuries been part of the law of England.

Thus, at the outset, it is well to bear in mind that throughout the entire history of the law of treason in England the overt act concept was of fundamental and supreme importance; that this English concept of what constituted an overt act was incorporated in our Constitution; and that, in their desire to give more ample protection against the power of government in cases of treason, the founders, in words of unmistakable clarity, deliberately made the law more favorable to the accused by requiring two witnesses "to the same overt act."

We propose to establish that the English authorities uniformly required that the overt act of itself fairly manifest the treason; and that the rule here is and should be the same. If a new rule, requiring merely two witnesses to some insignificant and on its face innocent and harmless circumstance, is formulated, the two witness rule becomes meaningless verbiage and the protection sought to be afforded the accused is mere illusion.

Nothing illustrates this better than the fact that the Circuit Court, by reason of its holding that "the act in and of itself may be innocent", felt obliged to decide that no distinction existed in respect of the legal requirements relative to overt acts between treason and mere conspiracy. Thus we find in the opinion of the Circuit Court (R. 485)

> "We believe in short that no more need be laid for an overt act of treason than for an overt act of conspiracy, which has never been thought of as itself establishing the unlawful scheme."[1]

[1] That the overt act in treason is a substantive part of the crime itself is not open to dispute. The so-called overt acts in conspiracy cases did not exist at common law; they are a purely statutory requirement serving a limited function, in no way comparable to overt acts of treason. It is well established that in conspiracy cases the so-called overt acts form no

The English Authorities.

The English jurists had little difficulty in determining what were sufficient overt acts of treason. Their problem was made easy, first for the reason that there were numerous ways to commit treason in England and many of them required a precise act, such as counterfeiting the king's seal or killing the king's treasurer; second, for the reason that by the time of the printed reports there had grown a wealth of case precedent concerning overt acts of treason; and finally for the reason that eminent and accepted jurists such as Coke, Hale, Blackstone and Foster not only compiled cases concerning treason but wrote of the general principles of this law, basing the principles not only on the decided cases, but as to those questions yet undecided, on their understanding of the evolution of this law and the general requisites of justice.

These jurists had definite ideas of what constituted an overt act of adhering to one's country's enemies; and these acts were none of them innocent of themselves. For example, Foster (*Crown Cases*, [1809 ed.] p. 217), lists fur-

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part of the crime itself. In *United States* v. *Britton*, 108 U. S. 199, 204, 205, 27 L. Ed. 698, 700, 2 S. Ct. 526, 531 (1883) it was held: "• • • This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. • • •". See also *Dealy* v. *United States*, 152 U. S. 539, 38 L. Ed. 545, 14 S. Ct. 680 (1894), *Bannon & Mulkey* v. *United States*, 156 U. S. 464, 39 L. Ed. 494, 15 S. Ct. 467 (1895), *Hyde* v. *Shine*, 199 U. S. 62, 50 L. Ed. 90, 25 S. Ct. 760 (1905), *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 59 L. Ed. 705, 35 S. Ct. 291 (1915), *Marino* v. *United States*, 91 F(2d) 691, 694, 695 (C. C. A. 9th, 1937), *United States* v. *Manton*, 107 F(2d) 834 (C. C. A. 2nd, 1938).

It is a notable circumstance that a so-called overt act necessary for the submission of a conspiracy case to the jury need be the act of but one of the conspirators. (See *Braverman* v. *United States*, 317 U. S. 49, 53, 87 L. Ed. 83, 85, 63 S. Ct. 99, 101 (1942), and cases there cited).

nishing rebels or enemies with money, arms, ammunition, or other necessaries, and sending money, provisions, or intelligence. And Blackstone writes (*Commentaries on the Laws of England*, Bk. IV, Chap. 6, ¶4) "'If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere he is also declared guilty of high treason.' This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like."

It is clear that according to the law of England, both prior to and after the adoption of our Constitution, only those overt acts were sufficient which manifested a treasonable intent.

Thus, Lord President Campbell, summing up to the jury in *Rex* v. *Watt*, [1794] 23 How. St. Tr. 1167, at 1388:

> "Gentlemen, to compass the death of the king, if such compassing be manifested[2] by any overt act, is by express terms of the statute itself, high treason; but what is or is not a sufficient overt act, within the intent of the statute, must always be open to inference and construction, according to the circumstances of each case as proved; for the statute does not say precisely what is an overt act, but it says, to compass the death of the king is treason, if accompanied by some overt act. The mere compassing or imagining the death of the king, so long as it remains an act of the mind only, cannot be reached by proof, and is not a proper subject of trial; but if it be manifested by a positive act, such as conspiring, plotting, forming plans, or providing arms, &c. these are circumstances capable of proof, and we must accordingly inquire into the nature of such circumstances, and see whether they do or do not

[2] Webster's *New International Dictionary* (2nd ed.) defines the verb "manifest" as follows: "To show plainly; to make to appear distinctly; to put beyond question or doubt; to display; exhibit; reveal; prove; evince; evidence."

> amount to that which in the construction of the statute has been held sufficient as an overt act, to prove this branch of treason, although the design may not have been carried into full effect. * * *"

And Lord Chief Justice Eyre, summing up to the jury in *Rex* v. *Crossfield* [1796] 26 How. St. Tr. 1, at 190:

> "* * * This indictment states, as by the law it must do, these leading facts which are the evidence of that compassing and imagining, and in the language of the law are called the overt acts: that is, the acts by which the secret intention is made manifest. * * *"

And Lord Ellenborough, addressing the Grand Jury in *Rex* v. *Despard*, [1803] 28 How. St. Tr. 345, at 349, 350:

> "I have already stated to you, that such acts as sufficiently indicate an intention to commit any particular species of treason, and conduce to its execution, are properly overt acts of high treason."

And in summing up to the jury in the same case, Lord Ellenborough defined overt acts, at 487, as:

> "* * * certain open deeds of the party, done in prosecution of the treasonable purposes imputed to him, and manifesting the existence of such purposes."

And Lord Chief Justice Abbott, charging the Grand Jury in *Rex* v. *Thistlewood*, [1820] 33 How. St. Tr. 682 at 685:

> "I have already intimated, that any act manifesting the criminal intention, and tending towards the accomplishment of the criminal object is, in the language of the law, an *overt* act."

That it was the law of England that only those overt acts were sufficient which manifested treason is evidenced further by statements of prosecuting attorneys (who may be presumed to have stated the law in terms most favorable to prosecution) in their openings to the jury.

Thus in *Rex* v. *De La Motte*, [1781] 21 How. St. Tr. 687, Attorney-General Wallace stated to the jury, at 717, that

> "Any measures actually taken, which manifest a traitorous intention, are overt acts of treason."

And in *Rex* v. *Watt*, *supra*, at 1194, Mr. Anstruther, Counsel for the Crown, stated:

> "I have stated to you, that an overt act is the means used to effectuate the purpose of the mind. I have stated to you, that any means used to an end which has an apparent tendency to put the king's life in danger is an overt act of high treason. * * *"

And in *Rex* v. *Henry and John Sheares*, [1798] 27 How. St. Tr. 255, at 294, Attorney-General Toler summed up to the jury, in part, as follows:

> "First as to that count of compassing and imagining the death of the king—According to the law which I have stated, and adjudged cases, in the construction thereof, the crime of compassing and imagining becomes complete, so soon as the wicked imagination is acted upon by acts of open deed manifesting obviously the intention of the actor. From that moment, the intention so manifested is the completion of the crime. And in considering the ground upon which you shall regulate yourselves in the application of the evidence adduced, you will be kind enough to keep in your mind, first the fact, which is to be demonstrative of the intention, and then consider the relation of that (when proved), to the design charged against the prisoner."

In deciding that the overt act need not of itself manifest treason but might be an innocent act, the Circuit Court relied heavily (R. 482) on the so-called Lord Preston's case (*Rex* v. *Sir Richard Grahme*, [1691] 12 How. St. Tr. 646). In this case it appeared that one Ashton and others had hired a boat to take a party from England to France, England being at war with France at the time. This party,

which included Lord Preston, then hired a sculler to take them by wherry from the shore to the boat. Shortly after 11 o'clock at night, the party boarded the wherry at Surrey-Stairs, which was in the County of Middlesex, and were rowed out to the boat, which was apparently located within the County of Surrey. The party then set sail, but were apprehended when the boat was within the jurisdiction of the County of Kent. Papers were discovered,[3] some of them bearing Lord Preston's seal and in his handwriting, informing the French how they best could invade England, said documents containing not only information concerning the fortifications of English harbors, but also advice as to the treatment of the English on the invasion.

The indictment laid treason in the County of Middlesex, and on his trial Lord Preston urged that no overt act of treason had been proved in the said County. But Lord Chief Justice Holt rejected the contention, and in summing up to the jury spoke as follows, at 740:

> "Ay, but gentlemen, give me leave to tell you, if you are satisfied upon this evidence that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen and make use of the papers to that end, then every step he took in order to it, is high treason, wherever he went; his taking water at Surrey stairs in the county of Middlesex, will be as much high treason, as the going a shipboard in Surrey, or being found on ship-board in Kent, where the papers were taken."

What Lord Chief Justice Holt says in effect is that once there is found a clear overt act of treason (carrying papers

[3] There are several references to Lord Preston's case in Foster's *Crown Cases* (1809 ed.) a leading treatise on the subject of treason. He states (p. 198), "The papers found in Lord Preston's custody, those found where Mr. Layer had lodged them, the intercepted letters of Dr. Hensey, were all read in evidence as overt acts of treason respectively charged on them; and William Gregg's intercepted letter might, in like manner, have been read in evidence, if he had put himself upon his trial." See, also, p. 196.

into France to incite an invasion of England), then any step taken in preparation for that act is itself an overt act of treason. And this is the interpretation and significance which Holdsworth gives to the case:

> "It comes to this—every act, however remotely connected with an overt act of compassing the king's death, is itself an overt act." Holdsworth, *History of English Law*, Vol. 8, p. 317.

Holdsworth treats *Lord Preston's* case under the heading "Constructive Treason"; and that Lord Chief Justice Holt's ruling extended the law of treason is evident when that ruling is compared to the Solicitor General's opening to the jury in that case.[4]

But be that as it may, there is nothing in Lord Chief Justice Holt's ruling which weakens petitioner's argument in this case. Lord Chief Justice Holt's ruling at least required that one clear overt act be proved before any other alleged overt act, innocent in itself, could be considered by the jury. Here petitioner contends that all the overt acts submitted to the jury were insufficient; and even if one or two of the three alleged were sufficient, there is nothing in the jury's verdict to indicate that it found that said particular sufficient overt act or acts were proved.

The Circuit Court also relied on the case of *Rex* v. *Lynch* [1903], 20 Cox C. C. 468, in support of the proposition that the overt act need not manifest the treason. In that case one of the overt acts alleged (and the one on which the Circuit Court commented) was that while England was at war with the Government of the South African Republic the defendant took an oath of allegiance to said Republic. We submit that this overt act clearly manifests the treason of adhering to enemies. The only question discussed by

[4] "Treason, gentlemen, consists in the imagination of the heart; but because that imagination of the heart can be discovered no other way but by some open act, therefore the law doth require, that some overt act, manifesting that intention, be assigned and proved. * * *" (At p. 678).

the Court in that case was whether by virtue of the Naturalization Act of 1870 the defendant had ceased to be an English subject at the time he took the oath of allegiance to the Government of the South African Republic.

Nor do the other English cases referred to by the Circuit Court in its opinion appear to sustain the rulings of the District Court herein. Indeed, they conform to the familiar pattern of the English law above referred to which requires that the overt act shall in and of itself manifest treason. Thus, in *Rex* v. *Vaughan* [1696], 2 Salk. 634, 91 Eng. Rep. 535, 13 How. St. Tr. 485, the defendant had actually seized and was using the English vessel Loyal Clencarty in the service of the King of France. The Circuit Court (R. 482) refers to this overt act as "merely by cruising on the high seas for the French King." But here, as in the case of Lord Preston and in the case of *Rex* v. *Lynch*, just referred to above, the act would seem plainly to manifest treason.

The *Case of Hugh Pine* [1628], Cro. Car. 117, 1 Hale P. C. 118, 79 Eng. Rep. 703, the Court merely repeats the rule well established in early English law that mere words "not relative to any act or design" do not amount to treason. Had the words in *The Case of Hugh Pine* related to some conspiracy or plot to kill the King, as in the next case cited by the Circuit Court (R. 483) *Rex* v. *Charnock* [1695], 2 Salk. 631, 91 Eng. Rep. 533, there would again have been an overt act of manifest treason.

The final English authority cited by the Circuit Court is *Rex* v. *Casement* [1917], 1 K. B. 98, 86 L. J. K. B. 467. A mere reading of the report indicates on its face that the overt acts charged were all of such a character as, in and of themselves, to import a treasonable purpose and the very sentence quoted by the Circuit Court (R. 483) sustains the view for which we contend. That sentence reads: "Overt

acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object.": *Trial of Sir Roger Casement* (1917, ed. by Knott, p. 183).

THE AMERICAN AUTHORITIES.

The decisions of the Courts of the United States seem on the whole to conform to the general rule laid down in England that the overt act to be sufficient must of itself manifest treason.

That this was the view of Judge Learned Hand is apparent from his opinion in *United States* v. *Robinson*, 259 F. 685 (D. C., S. D. N. Y., 1919), where he pronounced the following dictum at page 690:

> "Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent. It is true that in prosecutions for conspiracy under our federal statute it is well settled that any step in performance of the conspiracy is enough, though it is innocent except for its relation to the agreement. I doubt very much whether that rule has any application to the case of treason, where the requirement affected the character of the pleading and proof, rather than accorded a season of repentance before the crime should be complete. Lord Reading in his charge in Casement's Case uses language which accords with my understanding:
>
> 'Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.'
>
> Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count and of those of the second count, which consist of acts that do not openly manifest any treason. Their traitor-

ous character depends upon a covert design, and as such it is difficult for me to see how they can conform to the requirement."

And in *United States* v. *Leiner* (Appendix), the Court directed a verdict for the defendant, indicted for treason, for the reason, in part, that the overt acts as proved (which in substance were the same as involved in our case, namely, meeting with Kerling, falsehoods told to the F. B. I. for the alleged purpose of concealing the identity and mission of Thiel and Kerling) did not of themselves manifest treason. In this connection the Court stated (Appendix, pp. 47-8):

> "After reading all the American cases, which are not too many, it is, in my opinion, not going too far to say that under the law of treason a jury is not to engage itself in making inferences at all but only to decide on the credibility of the two witnesses who must prove the commission of each overt act or each part of an act consisting of parts. As one Judge said, the constitutional and statutory requirement of an overt act is intended to exclude the possibility of conviction for the odious crime of treason upon proof of facts which were treasonable only by construction or inference or which have no better foundation than mere inference. Other testimony is admitted to confirm the intent that must initially be evidenced by the very nature of the overt act in order to remove a reasonable doubt from the mind of the juror but not for any other reason."

See also *Charge to the Grand Jury*, 30 Fed. Cas. 1036 (C. C., S. D. Ohio, 1861), at 1037:

> "it has been already noticed, that to justify a conviction for treason, unless the crime is confessed in open court, there must be the evidence of two witnesses to an overt act. The plain meaning of the words 'overt act', as used in the constitution and the statute, is an act of a character susceptible of clear proof, and not resting in mere inference or conjecture. *They were*

intended to exclude the possibility of a conviction of the odious crime of treason, upon proof of facts which were only treasonable by construction or inference, or which have no better foundation than mere suspicion. In its benign caution on this subject, the law requires not only proof of a treasonable act, but that it should be established by the oaths of two witnesses. Hence, it will be obvious that however strong may be the grounds of suspicion or belief, that an individual is disloyal to his country or his government, until his disloyalty is developed by some open and provable act, he is not legally guilty of the crime of treason. And it follows, also, that mere expressions of opinion indicative of sympathy with the public enemy, will not ordinarily involve the legal guilt of that crime. They may well justify a strong feeling of indignation against the individual, and the suspicion that he is, at heart, a traitor, but will not be a sufficient basis for his conviction in a court of law. * * *" (Italics supplied.)

The only American cases cited by the Circuit Court are to be found at pp. 4835 of the Record. The report of

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In many States, before self-defense can be raised as a defense to a charge of murder, it is required that there be shown some "overt act" on the part of the deceased. In such cases the overt act is generally defined as follows:

"An overt act is a hostile demonstration of such character as to create in the mind of a reasonable person the belief that he is in immediate danger of losing his life or of suffering great bodily harm. The term 'overt act' as used in connection with prosecutions where the plea of self-defense is involved, means any act of the deceased which manifests to the mind of a reasonable person a present intention on his part to kill defendant or do him great bodily harm." *State* v. *Stragnet*, 190 La. 457, 470, 471, 482 So. 571, 575 (1938).

See also, *Cooke* v. *State*, 18 Ala. App. 416, 93 So. 86, at 88 (1921); *State* v. *Lehman*, 44 N. D. 522, 175 N. W. 736, at 740 (1919); *Johnson* v. *State*, 125 Tenn. 420, 143 S. W. 1134, at 1137 (1912).

In New York an overt act is required for conviction for attempt to commit a crime. (*Penal Law*, § 2) In this connection an overt act has been thus defined: "An overt act is one done to carry out the intention, and it must be such as would naturally effect that result, unless prevented by some extraneous cause." *People* v. *Mills*, 178 N. Y. 274, at 284, 285, 70 N. E. 786, 790 (1904).

United States v. *Fricke*, 259 Fed. 673 (D. C., S. D. N. Y., 1919) was the charge to the jury by Mayer, D. J., and it is in many respects at variance with the opinion of Judge Learned Hand in *United States* v. *Robinson*, *supra*. There is naturally no discussion or attempted analysis of the authorities.

The meager report in *United States* v. *Lee*, 26 Fed. Cas. 907 (C. C., D. C., 1814), which is the case involving the purchase of the watermelons, does not give a clear statement of the evidence, about which there seems to have been some dispute. It is far from clear that the Court held or intended to hold that the mere purchase of the watermelons, proved by two witnesses, could constitute an overt act in treason. This was another case in which the defendant was acquitted.

The other American cases cited in the opinion by the Circuit Court seem to cast little light on the subject.[6]

We have found no case, nor has any been cited, where

[6] The Circuit Court discusses (R. 483) the case of *Ex Parte Bollman*, 4 Cranch, 75, 8 U. S. 75, 2 L. Ed. 554, which involved the treason of levying war. It was there decided that before an accused could be convicted of the treason of levying war, it must be shown that there was an actual assemblage of men for the purpose of executing a treasonable design. Chief Justice Marshall explained the purpose of this requirement in *United States* v. *Burr*, 25 Fed Cas. No. 14693. (C. C. Va. 1807), as follows at 169:

> "Before leaving the opinion of the Supreme Court entirely, on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, why is an assemblage absolutely required? *Is it not to judge in some measure of the end by the proportion which the means bear to the end?* Why is it that a single armed individual entering a boat, and sailing down the Ohio for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war?" (Italics supplied).

Thus in the case of the treason of levying war the actual assemblage must be shown to give credence to the alleged treasonable design of levying war. So also in the case of the treason of adhering to enemies, the overt act of itself must manifest treason to give credence to the existence of the alleged treasonable design of adhering to enemies.

a mere meeting with an enemy has been held to be a sufficient overt act of treason.

It was pressed upon the Circuit Court that the question now being argued must be deemed to have been disposed of by this Court by reason of its refusal to grant certiorari or rehearing in *Stephan* v. *United States*, 133 F(2d) 87 (C. C. A. 6th, 1943), certiorari denied—318 U. S. 781, 63 S. Ct. 858 (1943), rehearing denied 319 U. S. 783, 63 S. Ct. 1172 (1943), and the Circuit Court inclined to that view (R. 484).

A careful examination of the record of the trial in the *Stephan* case discloses that no motions whatever were made at the close of the case with respect to the several alleged overt acts. Had such motions been made as were made in the case now before the Court, it is fair to infer that many of the alleged overt acts would have been withdrawn from the consideration of the jury. In any event, some of the overt acts charged in the *Stephan* case were plainly sufficient, such as (5) which charged that Stephan "furnished, supplied and gave to said enemy, Peter Krug, food, drink and personal effects and clothing" to aid his concealment and escape and (13) that he had "supplied him with food and drink, and arranged, purchased and paid for transportation * * * from Detroit to Chicago." That Stephan with full knowledge of the fact that Peter Krug was an escaped German flyer, attempting to make his way back to Germany, gave him every sort of aid and comfort that could be of any avail under the circumstances was established by overwhelming evidence and was not contradicted by any proof to the contrary.

II.

We urge certain additional considerations in support of the contention that the proof in support of Overt Act 10 failed openly to manifest treason and was legally insufficient.

Petitioner was taken into custody about 10:50 p. m. on June 27, 1942 (R. 69, 105) by F. B. I. Agents Willis, MacInnes and Duncan at the Kolping House, 165 East 88th Street, New York City. From the Kolping House petitioner was taken directly to the New York office of the F. B. I., which is located in the United States Court House in New York City, arriving there at 11:20 p. m. (R. 105-106, 291). Sometime between 11:20 p. m. and 2 a. m. of the following morning petitioner made the statements on which Overt Act 10 is based (R. 106-12, 121).

Thiel was arrested by agents Donegan, Drayton and Foster at about 11:45 on the evening of June 23, 1942 (R. 86). Accordingly, when the statements alleged in Overt Act 10 were made by petitioner, the person whom he was alleged to have intended to give aid and comfort was already under arrest. For whatever bearing the circumstance may have upon petitioner's state of mind, his testimony was that on the evening before he was himself arrested "the thought definitely occurred to me, perhaps Thiel is arrested." (R. 286). The Government made no attempt to plead or prove that petitioner knew or had reason to believe that Thiel had not yet been apprehended at the time these statements were made.

The English authorities abound with general statements that mere words may not ordinarily constitute an overt act in treason. And there is something seemingly incongruous in holding that this heinous crime, punishable by death, may be committed by a person already in the custody of the law where common experience teaches that in the fear and excitement attendant upon the arrest many people make false statements with a vague idea that in some way they may extricate themselves.

The course of the interview was substantially this: At first Special Agent Willis asked petitioner who was the man he had been with on the evening of June 23rd and peti

tioner said his name was William Thomas and that this William Thomas had gone to the west coast to take a job in a factory in March of 1941 and had not been out of the United States (R. 106). It was then made apparent to petitioner that the F. B. I. men knew the identity of Werner Thiel and petitioner promptly admitted that the man was in fact Werner Thiel and said that Thiel was using the alias of William Thomas because of difficulty with the draft board (R. 106). He still stuck to his statement that this man had not been out of the United States (R. 107) and he further stated that the money belt given him by Thiel contained only $200; that there was about $3,500 in the safe deposit box which petitioner claimed belonged to him (R. 107-108). He finally asked Special Agent Willis to withdraw so that he could speak to Special Agent Ostholthoff alone when he admitted that all the money had been in the belt given him by Thiel with sundry other details (R. 109ff). After his conversation alone with Ostholthoff, he told Special Agent Willis that he had made the false statements at first to protect Werner Thiel "because Werner Thiel was his friend." (R. 108).

Substantially similar statements had been made by Lehner, who was also indicted for treason and whose trial, in the United States District Court of the Southern District of New York, on that charge before Hon. John W. Clancy and a jury was had shortly after the conviction of petitioner. In directing a verdict for the defendant in the *Lehner* case, Clancy, D. J., made the following comment concerning Overt Act 7 in that case (Appendix, pp. 47-9):

> "I am convinced that misstatements by a prisoner to his captors can constitute an overt act of treason only when there is pleaded and proved as necessary concomitant conditions that the prisoner knew or had reason to believe that the enemy alleged to be adhered to had not yet been apprehended and that the misstatements are such that their obvious result would be to

avert the enemy's apprehension or aid his depredations, and further, such as could not exculpate the prisoner.".

The danger of injustice in basing overt acts of treason on oral statements made by the accused after his arrest is a real one. Particularly in the case of people of humble origin, such as petitioner, it is almost inevitable that some false statements of fact will be made, at least in the beginning when the state of mind of the accused is in turmoil and distress. Almost anything said under these circumstances could be later construed as possibly giving some aid and comfort to an enemy.

THIRD POINT

Overt Act 10 should not have been submitted to the jury for the additional reason that petitioner's statements, which form the substance of that Act, were made by him subsequent to the time he was taken into custody but prior to the time of his arraignment.

This is a new point now raised for the first time in this Court in this case.

McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 579 (1943), was decided March 1, 1943, and sentence was imposed upon petitioner herein December 2, 1942 (R. 449). No objection was made to the testimony of the F. B. I. men upon the ground that their evidence in support of Overt Act 10, as charged in the indictment, was inadmissible. Separate motions were made, however, to withdraw from the consideration of the jury each and every one of the overt acts, other than those already withdrawn by the Government, and such a motion was specifically addressed to Overt Act 10 (R. 871). It was claimed that the evidence was insufficient to warrant the submission of any one of the overt acts to the jury and appropriate exceptions were taken to the denial of the motions and to the charge as well, in this respect.

The evidence already adverted to establishes that petitioner was taken directly from the place of arrest to the F. B. I. Room in the United States Court House in New York City where he was questioned between 11:20 P. M. and 2 A. M. of the following morning.

He was arraigned on this treason charge on August 31, 1942 (R. 1). While the record does not indicate any prior arraignment, the dates in the indictment (R. 1) would seem to suggest that petitioner was arraigned on July 17, 1942. In any event, the testimony of Special Agent Willis (R. 1056), as to the sequence of events immediately following petitioner's arrest, makes it abundantly plain that petitioner was not "immediately taken before a committing officer," or "the nearest United States Commissioner or the nearest judicial officer having jurisdiction," and that the statements alleged to constitute Overt Act 10 were made after arrest and prior to arraignment.

There appears to have been no violence or intimidation whatsoever by any of the Government Agents and the statements made were voluntary in character. Petitioner made no claim at any time to the contrary nor did he claim that the Government Agents treated him in anything other than a courteous and proper way at all times.

The fact remains, however, that petitioner is a person of humble origin and occupation and that his command of the English language is none too good. That petitioner had no realization whatever that any serious charge would be preferred against him seems clear; and his chief concern was about the $200 which had been given to him by Thiel in repayment of his indebtedness (R. 134-135).

18 *U. S. C.* § 595 provides as follows:

> "*Persons arrested taken before nearest officer for hearing.* It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the

nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof."

5 *U. S. C.* § 300a provides as follows:

"*Federal Bureau of Investigation; authority of officers to serve warrants and make arrests; authority to carry arms*

The Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Federal Bureau of Investigation of the Department of Justice are authorized and empowered to carry firearms."

Had petitioner been arraigned as required by law and advised of his legal rights, it is extremely unlikely that he would have made the false statements which form the substance of Overt Act 10.

Petitioner was born October 5, 1900, in Germany in the small farming community of Ollendorf in Westphalia (R. 218). His formal education was limited to elementary

school in Ollendorf and a course in a school of forestry and agriculture in Muenster, which he finished at the age of 17 (R. 219-220). He arrived in this country on July 27, 1925 (Govt's. Exh. 37, R. 55). He did not then understand English (R. 243). He has had no formal education in this country, although he did study books at home in order to prepare for an engineer's license, enabling him to work in a boiler room (R. 233-234). He was constantly trying to improve his command of English, as is evidenced by a well worn booklet entitled "How to Improve your English" found on his person at the time of his arrest (R. 243).

It may be that this Court will feel that this evidence given immediately after his arrest and prior to his arraignment, should not have been admitted against petitioner, or that it should not be admitted in the event of a new trial. As counsel did not have this point in mind at the time of the trial, the *McNabb* case not having as yet been decided by this Court, the evidence is necessarily somewhat incomplete and obscure. No specific questions relative to the time of arraignment were addressed to any of the F. B. I. men and we infer that this is what is meant by the statement in the foot note to the opinion of the Circuit Court (R. 480). It is reasonably to be inferred, however, from the testimony of Special Agent Willis, above referred to, that the statements alleged to constitute Overt Act 10 were made prior to arraignment. In other words, petitioner was arrested at the Kolping House, 165 East 88th Street, New York City, at about 10:50 P. M. (R. 69, 105) and taken to the New York office of the F. B. I. in the United States Court House in Foley Square, New York City, arriving there at 11:20 P. M. (R. 105, 106, 291); and the statements alleged in Overt Act 10 were made between 11:20 P. M. and 2 A. M. of the following morning (R. 106-12, 121). There was just barely sufficient time between 10:50 and 11:20 P. M. to transport petitioner from the place of arrest to the Court House. It seems evident that there was no arraignment as required

by law in this brief interval of time. Nor is there any reference to any such waivers as were signed by defendants in *United States* v. *Haupt*, 136 F. (2d) 661 (C. C. A. 7th, 1943). The situation is not unlike that developed generally in the *Haupt* case, due to the fact that the *McNabb* case was decided later. In any event, we think it our duty to bring the point to the attention of this Court, which has the power to notice error in the trial of a criminal case although the question was not properly raised at the trial. *Wiborg* v. *United States*, 163 U. S. 632, 16 S. Ct. 1127, 41 L. Ed. 289 (1896), *Crawford* v. *United States*, 212 U. S. 183, 29 S. Ct. 260, 53 L. Ed. 465 (1909).

If this evidence should have been excluded because of the failure on the part of the F. B. I. men to observe the terms of the statute requiring that the accused be arraigned immediately after his arrest, it would seem to follow that the testimony of the two witnesses to Overt Act 10 was in its entirety incompetent, inadmissible and illegal, even though no objection was raised on that ground. It was accordingly error to have submitted Overt Act 10 to the jury.

An entirely separate question of even more fundamental import is likewise presented. How can a statement procured by Government Agents by illegal means constitute an overt act of treason?

FOURTH POINT.

(A) The Court below erred in submitting to the jury Overt Acts 2 and 10 on the further ground that the allegations thereof had not been proved by the testimony of two witnesses; (B) and the Court erred in charging the jury with respect to the requirement of proof by two witnesses to each overt act.

Point (A) was raised by counsel for the petitioner on motion to direct a verdict at the close of the entire case (R.

370-371). With respect to Point (B), the Court charged the jury as follows (R. 442):

> "The Constitution of the United States provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act. This means that the Government must prove at least one of the three overt acts charged in the indictment by the testimony of two witnesses. These witnesses must be direct witnesses to the overt act. Where the overt act is of a type which is separable into parts, that is, a continuance and composite act made up of several circumstances and passing through several stages, there must be two direct witnesses to each part of the act, but they need not be the same two witnesses who testified to other parts of the act, so long as each part of the overt act is supported by the testimony of two witnesses."

And counsel for the petitioner excepted to the foregoing portion of the charge (R. 446-447).

Overt Act 2 consists of two meetings between petitioner and Thiel, one at the Twin Oaks Inn, the other at Thompson's Cafeteria. The meeting at Twin Oaks Inn was testified to by Agents Rice (R. 80-81) and Willis (R. 101-102). The meeting at Thompson's Cafeteria was testified to by Agents Rice (R. 81) and Stanley (R. 84).

The Constitutional requirement is that there be two witnesses to the same overt act. It is our contention that this means that there must be two witnesses to the *whole* overt act. It is apparent that there were not two witnesses to the *whole* overt act, in the sense that the whole overt act consisted of two conferences.

In *United States v. Robinson, supra*, the question arose whether it was enough to prove one element of the overt act by one witness, and another by another. Judge Learned Hand concluded that it was not, and stated at 694:

> "I conclude, therefore, that it is necessary to produce two direct witnesses to the whole overt act. It may be possible to piece bits together of the overt act,

but, if so, each bit must have the support of two oaths; on that I say nothing."

The rule is so stated by Wigmore, *Evidence* (3rd Ed.), § 2038:

"(4) Each of the witnesses must testify to the *whole* of the overt act or, if it is separable, there must be two witnesses to each part of the overt act. The rule seems not to have suffered any dilution like that which occurred to the perjury rule."

The point here raised was decided against petitioner by the Circuit Court on the ground that:

"If the policy behind the two-witness rule is to protect the accused fully against conviction upon the false testimony of one hostile witness, certainly this multiplication of witnesses will still better insure the result" (R. 486).

But it is important not only that there be two or more witnesses, but also that there be two witnesses testifying to the *same* overt act. Overt Act 2 is a single overt act. As the accused's guilt depends on the happening of Overt Act 2 *in toto*, it is no protection to him that two witnesses testify to each of its parts, but no two to the act as a whole.

That it was the intention of the framers of the Constitution to provide for a strict rule of proof with respect to overt acts cannot be doubted in view of their rejection of the provision of the then current English statute, 7 William III, to the effect that the accused could be convicted on the testimony of two witnesses to the same overt act, or one to one and another to another.

There was testimony to the following part of Overt Act 10 by one witness only, Agent Willis (R. 108):

"and was kept by him in a safe deposit box because he considered it safer there than in his savings account in said bank."

The Circuit Court held that this part of Overt Act 10 could now be regarded as mere surplusage in view of the other proved allegations. The Court further stated that the jury could not conceivably have relied on it solely to establish the act, for it presupposed petitioner's claim of ownership, which was in fact proved by two witnesses. It is submitted that the part of Overt Act 10 in question does not presuppose petitioner's claim of ownership inasmuch as one can readily keep other people's money in one's safety deposit box or savings account. But even if it did presuppose the claim of ownership, it is extremely doubtful whether the claim of ownership to the $3,500 would have in itself been a sufficient overt act of treason to submit to the jury. The mere fact that the other statements mentioned in Overt Act 10 were testified to by two witnesses is not decisive since the witnesses must be believed by the jury.

Furthermore, the jury was allowed to consider that part of Overt Act 10 in question as an overt act, that is, as an act particularly demonstrative of intention. And since it was defective as an overt act the jury may have given it undue weight in determining the crucial question of traitorous intention.

FIFTH POINT.

The evidence as a whole failed to make out a case against petitioner and the motion for the direction of a verdict in his favor should have been granted.

Exception was noted to the refusal to grant petitioner's motion for a directed verdict (R. 370). In view of the discussion of the allegations and the proof already set forth, any elaboration of this point would be mere repetition.

Conclusion.

The Judgment Appealed from Should Be Reversed and the Indictment Dismissed or, in the Alternative, a New Trial Ordered.

Dated: New York, February 16, 1944.

Respectfully submitted,

HAROLD R. MEDINA,
Counsel for Petitioner.
JOHN McKIM MINTON, JR.,
RICHARD T. DAVIS,
Of Counsel.

APPENDIX.

United States v. Helmut Leiner.

Mr. Oberwager: If your Honor please, I rest, and with your Honor's permission I renew the motion that your Honor direct the jury to find a verdict in favor of the defendant dismissing the indictment and the charges therein.

(The jury returned to the courtroom).

The Court: The motion to direct a verdict must be granted. All of the law of treason is well settled and is stated in *U. S. v. Robinson*, 250 Fed. 685. That decision adopts as a definition of the overt acts required by the Constitution such an act as "manifests a criminal intention and tends towards the accomplishment of the criminal object. One by which the purpose is manifested and the means by which it is intended to be fulfilled." This definition is found in all the American cases without exception and was charged in this Court by Judge Goddard two weeks ago.

The third of the overt acts pleaded is not proved. There is no evidence in the case that Leiner conferred, treated and counselled with Kerling at the Crossroads Cafe, the evidence being affirmatively to the contrary; that what they did in there was not observed.

None of the others of the first six overt acts proved in this case meets the definition. None of them manifests or utters a treasonable purpose. None of them tends on the evidence to accomplish the criminal object. The defendant's extra judicial confession is admissible only for the purpose of corroborating the intent evidenced by an overt act already proved by the testimony of two witnesses. Since no treasonable intent appears from any of the six acts first stated in the indictment, the confession must be stricken out for all purposes excepting only the purpose of establishing the fact which is pleaded as a seventh overt act, and to which I shall advert.

After reading all the American cases, which are not too many, it is, in my opinion, not going too far to say that under the law of treason a jury is not to engage itself in making inferences at all but only to decide on the credibility

of the two witnesses who must prove the commission of each overt act or each part of an act consisting of parts. As one Judge said, the constitutional and statutory requirement of an overt act is intended to exclude the possibility of conviction for the odious crime of treason upon proof of facts which were treasonable only by construction or inference or which have no better foundation than mere inference. Other testimony is admitted to confirm the intent that must initially be evidenced by the very nature of the overt act in order to remove a reasonable doubt from the mind of the juror but not for any other reason.

Coming now to the seventh and last overt act pleaded in this case, it was alleged and proved that the defendant told three falsehoods to agents of the F. B. I. These falsehoods are that Kerling did not tell the defendant that Kerling had come here in a submarine; that Kerling never transferred any money to him; and that he had gone to a beer hall when, in fact, he had gone to look up Cramer. It is alleged that these falsehoods were given for the purpose of concealing the identity and mission of Kerling and Thiel which, in my opinion, they could not do at all. And it is only after that assumption is adopted that the acts, namely, the false statements conceal the identity and mission of Kerling and Thiel that they are pleaded as acts that involve any intent to aid Kerling. But this objection I would pass for maybe it is debatable. I am convinced that misstatements by a prisoner to his captors can constitute an overt act of treason only when there is pleaded and proved as necessary concomitant conditions that the prisoner knew or had reason to believe that the enemy alleged to be adhered to had not yet been apprehended and that the misstatements are such that their obvious result would be to avert the enemy's apprehension or aid his depredations, and further, such as could not exculpate the prisoner.

The substantial difficulty with the whole overt act is this: that no one can say definitely what the defendant's intention in telling these falsehoods was. Self-preservation is the first law of human nature and the least choice that would be given to a juror would be to determine whether the defendant, in making the false statements, was intending to cover himself or to cover Kerling and Thiel. While either

inference might be deemed reasonable, the decision that either was the actuating intent or even an intent in telling the falsehoods and committing the act, would be the merest speculation and no juror could make such determination without a reasonable doubt. The evidence, in other words, of this act is probative but too weak to satisfy the burden of proof beyond a reasonable doubt imposed upon the Government.

Under the Constitution and the law, I have no alternative except to grant the motion to direct a verdict, and I direct the foreman of the jury to return a verdict of not guilty which, according to my instructions, you do.

The Clerk: So do you all.

The Foreman: Yes.

The Court: I want to thank the jurors for their service and especially their willingness to serve in a case they knew was going to be trying.

The defendant is in the hands of the marshal and he may be disposed of in such manner as the Attorney General may direct that he should.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 13

ANTHONY CRAMER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

HAROLD R. MEDINA,
Counsel for Petitioner;
JOHN MCKIM MINTON, JR.,
RICHARD T. DAVIS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 406

ANTHONY CRAMER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

I.

For his second point set forth in his main brief petitioner contends that the District Court erred in submitting to the jury Overt Acts 1, 2 and 10 on the ground that such acts were legally insufficient in that they did not openly manifest treason. Respondent in its brief misinterprets petitioner's contention that to be legally sufficient an alleged overt act of treason must openly manifest treason.

Petitioner does not argue, as the respondent assumes he does, that the overt act must of itself and apart from other

evidence comprehend and establish the whole crime of the treason of adhering to the enemy. Apart from the proof of the overt act it may be shown, of course, that the accused owed allegiance to the United States, that the persons with whom the accused had his allegedly treasonable dealing were enemies of the United States. Furthermore, evidence apart from evidence of the overt act may probably be given to show that the accused had a treasonable design. However, the overt act of the treason of adhering to the enemy must of itself manifest treason in the sense that it must of itself give color and credence to the existence of the treasonable design. It must be within those species of acts, recognized by authorities such as Blackstone and Foster (see Pet. Br. pp. 24-25) to be sufficient overt acts of the treason of adhering to the enemy. It is in this sense that the authorities use the term "manifest", and it was with this thought in mind that this Court has required, in the case of the treason of levying war, that there be shown an actual assemblage of men gathered together for the execution of a treasonable purpose (Pet. Br. p. 34 fn.). As pointed out in petitioner's main brief (p. 23), if the rule of law were otherwise, if the overt act can be some insignificant and on its face innocent and harmless circumstance, having no apparent and necessary relation to the treasonable design charged against the accused, then it is no protection to the accused that such an act be testified to by two witnesses.

There is admittedly precedent for an exception to the general rule that an overt act to be legally sufficient must of itself manifest treason. This exception, one which is not in point in this case, is found in Lord Preston's case (*Rex v. Sir Richard Grahme* [1691], 12 How. St. Tr. 646), which is heavily relied on by respondent (Res. Br. pp. 41ff) and which is discussed in petitioner's main brief at pages 27-29.

The exception is this: once there is alleged and proved a proper overt act of treason, then any step taken in preparation for that overt act is itself an overt act although standing alone it would not be an overt act.[1]

Inasmuch as under the rule for which respondent contends[2] each and every overt act may of itself be an entirely innocent act,[3] the rule goes far beyond the rule set forth in

---

[1] Petitioner does not assume, as respondent states he does (Res. Br. p. 47), that Lord Preston actually succeeded in carrying the papers into France. The fact is, and it is so stated in petitioner's main brief at page 28 that Lord Preston and his company set sail in the County of Surrey but were apprehended in the County of Kent. In his charge to the jury (Pet. Br. p. 28, Res. Br. pp. 46-47), Lord Chief Justice Holt required the jury to find first that Lord Preston was going into France with the papers to excite an invasion of England, which was one of the overt acts alleged, and stated that having made this finding the jury might find that any act taken in preparation for that overt act was itself an overt act of treason, even though the step taken in preparation for the overt act was on its face innocent, such as going on board the ship in the County of Middlesex.

There was uncontroverted evidence that Ashton, Burdet, and Elliot hired the boat in which Lord Preston was apprehended, for the purpose of going to France (685). After the boat left the County of Surrey, it was the practice of the members of the party to hide in the hold, on the ballast, when another vessel approached (689), and Lord Preston and the others were found thus hiding when Captain Billop and his crew apprehended and searched the boat (696, 701). Billop brought Lord Preston and the others up from the hold. Ashton, however, went down again into the hold, pretending to look for his hat, and while there was seen to take something from the ballast and cram it into his bosom (701). The member of Billop's crew who saw this told Billop, and Billop searched Ashton and found the packet of treasonable papers (697). Some of these papers were in Lord Preston's handwriting and some of them bore his seal (726). Lord Preston offered to do Billop any service that lay in his power if Billop would dispose of the packet (698).

[2] "The act must, we believe, be a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, giving them aid and comfort" (Res. Br. p. 35).

[3] "But we do not understand the authorities to require that this fact — the actual or intended giving of aid and comfort — must, any more than the intent of the actor, appear on the face of the act or be proved by two witnesses who testify to the act. If the act be proved by testimony of two witnesses, its tendency to effectuate the design of aiding the enemy may be shown by other competent evidence" (Res. Br. p. 36).

Lord Preston's case which is itself regarded by Holdsworth as a constructive extension of the crime of treason (Pet. Br. p. 29).

Furthermore, even under the rule proposed by respondent it would seem necessary that the "program or course of action" of which the overt act is alleged to be a part must necessarily be a program or course of action formulated and agreed upon prior to the overt act. Otherwise the act cannot be said to be part of the program. There is no evidence, however, from which it can be inferred that petitioner was a party to a program of treason prior to his alleged commission of Overt Acts 1 and 2. While Agent Ostholthaff testified that petitioner told him that he had learned from Thiel that Thiel was on a mission for the German Government (R. 154-155), and while Norma Kapp testified to certain information concerning Thiel related to her by petitioner (R. 177-178), there is no evidence that petitioner learned any of this matter before the alleged commission of Overt Acts 1 and 2. Thus, even by its own test, the respondent's case fails.

Moreover, the exception found in Lord Preston's case can in no event sustain the government's case, since petitioner urges (Pet. Br. p. 29) that all the alleged overt acts were insufficient, and even if one or two of the three submitted to the jury were sufficient, there is nothing in the jury's verdict to indicate that it found a sufficient overt act to be proved. Furthermore, no overt act submitted to the jury in this case can be said to be an act in preparation for any other act alleged to be an overt act in the way that going aboard the ship in Middlesex was preparatory to the design of carrying treasonable papers on that ship into France.

Respondent cites *Trial of David Maclane* [1797] 26 How. St. Tr. 721, as an English case supporting the proposition that the overt act is not required itself to disclose the accused's treasonous intent (Res. Br. p. 48). But this ques-

tion was not an issue in that case. Counsel for Maclane contended that the proof was deficient in that there was no proof that Maclane had actually given aid and comfort to the enemy (785). Whether or not the aid sought to be given the enemy had to be successfully rendered to constitute treason was the question of law before the Court, as is evidenced by the very quotation from the case presented by respondent (Res. Br. pp. 48-49). The Court decided that the aid need not be successfully rendered.*

In the *Maclane* case there were alleged fourteen overt acts consisting variously of such acts as soliciting the King's enemies to invade the province, soliciting the King's subjects to levy war against the King, raising men to levy war against the King, conveying arms and ammunition into the province for the purpose of waging war against the King, collecting information whether the King's subjects were or were not well affected, and whether or not they would join the enemy in a hostile invasion of the province, acquiring knowledge of the strength of the City of Montreal and how it might be attacked, with intent to communicate it to the enemy. Then, in the overt act referred to in respondent's brief (p. 48) it was alleged that having then there in his possession the information as to whether the King's subjects were or were not well affected, whether or not they would join the enemy in a hostile invasion of the province, and concerning the strength of Montreal, he departed from Quebec towards foreign parts, with intent to communicate it to the enemy. On the trial a witness testified (771-772) that Maclane told him in Vermont, in the United States, that he had just left Montreal and was on

* Petitioner agrees with the proposition stated in respondent's brief (p. 35 fn.) that the treasonable design need not have been successfully accomplished to constitute treason. This was also the sole point of law involved in *Rex* v. *Vaughan*, cited in petitioner's brief at page 30, and in respondent's at page 49.

his way to Philadelphia with the information concerning the disposition of the people of Quebec toward the King, for the purpose of giving it to a Mr. Adet, a representative of the French Government residing in Philadelphia. France was at war with England and Maclane was a spy in the employ of the French. There can be no doubt that all the overt acts in the case manifested treason.

The case of *United States* v. *Pryor*, 27 Fed. Cas. 628, Case No. 16,096, cited by respondent at page 51 of its brief, actually supports the rule of law for which petitioner contends, and lends further doubt that the Court in *United States* v. *Lee* (cited in petitioner's brief, p. 34, respondent's brief, p. 51), held or intended to hold that the purchase of watermelons was a sufficient overt act of treason.

In the *Pryor* case, the only overt acts apparently relied on by the Government were allegations that the defendant undertook to procure provisions for the use of the enemy, and that he proceeded from an English boat to the shore with that intent. Defendant admitted doing these acts with the intent alleged. But the Court held that these acts did not amount to an overt act of treason, and so instructed the jury which gave its verdict of not guilty without leaving the bar. The Court stated, at page 630, that while undertaking to procure provisions was not a sufficient overt act of treason, the carrying of the provisions towards the enemy would have been sufficient:

> "Can it be seriously urged that if a man, contemplating an adherence to the enemy, by supplying them with provisions, should walk toward the market-house to purchase, or into his own fields to slaughter whatever he might find there, but should, in fact, do neither one or the other of the intended acts, he has committed an overt act of adhering to the enemy? Certainly not. All rests in intention, merely, which our law of treason in no instance professes to punish. Carrying provisions

towards the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different from the act of going in search of provisions for such a purpose, and stopping short before any thing was effected, and whilst all rested in intention."

So in our case, for example, the meeting without more between petitioner and Thiel is not an overt act of treason. But if there could have been alleged and proved as an overt act that at this meeting the parties made and discussed plans for aiding the enemy, this would doubtless have been a sufficient overt act of treason. At the mere meeting all rests in intention only; on conspiring at the meeting to aid the enemy, the treasonable intention becomes manifest.

II.

For his third point set forth in his main brief petitioner contends that Overt Act 10 should not have been submitted to the jury for the additional reason that petitioner's statements, which form the substance of that Act, were made by him subsequent to the time he was taken into custody but prior to the time of his arraignment. In his opening brief petitioner made two contentions on this point: (1) that testimony concerning statements made by petitioner while under illegal restraint should not have been admitted in evidence; (2) that statements procured by Government Agents by illegal means cannot constitute an overt act of treason. In its brief respondent treats only the first of these propositions, and we again bring the second to the notice of the Court for the reason that, as stated in petitioner's main brief at page 42, it is believed to raise a separate question of the most fundamental import.

III.

For his fourth point set forth in his main brief petitioner contends (A) that the District Court erred in submitting to

the jury Overt Acts 2 and 10 on the further ground that the allegations thereof had not been proved by the testimony of two witnesses; and (B) that the Court erred in charging the jury with respect to the requirement of proof by two witnesses to each overt act.

Petitioner contends that Overt Act 2 was not proved by the testimony of two witnesses. Overt Act 2 alleges in part that petitioner "did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn * * * and at Thompson's Cafeteria * * *". In his main brief (at p. 43) petitioner argues that each of these conferences and meetings were not testified to by the same two witnesses. Respondent states (Res. Br. p. 72) that this contention is not sustained by the record, that Agents Willis, Fisher, and Rice testified to the meeting in the Twin Oaks Inn and that these three, along with Agent Stanley, testified to the meeting in Thompson's Cafeteria (Res. Br. p. 72).

Respondent first confuses Overt Acts 1 and 2. Overt Act 1 alleges a meeting at the Twin Oaks Inn between petitioner, Thiel, and Kerling. Overt Act 2 alleges two meetings between petitioner and Thiel alone. The meeting between petitioner and Thiel at the Twin Oaks Inn was testified to by Agents Rice (R. 80-81) and Willis (R. 101-102). But Agent Fisher did not testify to this meeting. While Fisher testified to the meeting alleged in Overt Act 1, that is, the meeting between petitioner, Thiel, and Kerling (R. 73-74), he left the Twin Oaks Inn when Kerling did, in order to follow him (R. 74), and returned to the Twin Oaks only to observe petitioner and Thiel leaving the Twin Oaks (R. 74).

Agents Rice and Willis testified to the first part of Overt Act 2 and Agent Rice testified to the second part of this Act (Res. Br. p. 43). The question then is whether Agent

Willis can be said to have testified to the second part. He testified that petitioner and Thiel went into Thompson's Cafeteria, stayed there a while having refreshment, and came out (R. 102). It is submitted that this is not testimony that petitioner "did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at * * * Thompson's Cafeteria * * *."

But petitioner's fourth point is valid even if the same two witnesses are deemed to have testified to each part of Overt Act 2. The Court charged the jury that "Where the overt act is separable into parts, that is, continuance and composite act made up of several circumstances and passing through several stages, there must be two direct witnesses to each part of the act, but they need not be the same two witnesses who testified to other parts of the act, so long as each part of the overt act is supported by the testimony of two witnesses" (R. 442). Thus, even if Agents Fisher, Willis and Rice each testified to both parts of Overt Act 2, the jury could have found, for example, that the first part of Overt Act 2 was proved only by the testimony of Willis and Rice and the second part only by the testimony of Rice and Stanley.[5] Thus the jury could have found that Overt Act 2 was proved as to each of its parts by two different sets of witnesses. This, petitioner submits, was reversible error.

Petitioner's fourth point pertains to Overt Act 10 in that the following part of that Act as alleged was testified to by one witness only (Pet. Br. p. 44): "and was kept by him in a safe deposit box because he considered it safer there than in his savings account in said bank." Respondent contends, however, that the requirement of a second

[5] Agent Stanley testified to the second part of Overt Act 2 at R. 84.

witness is supplied by petitioner's own testimony (Res. Br. pp. 75 ff.).

Article III, Section 3 of the *Constitution of the United States* provides, in part, that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Concededly petitioner's testimony does not constitute a confession in open court (Res. Br. pp. 77-78). It is submitted that any defect in the proof of an overt act by two witnesses cannot be supplied by the accused's own testimony. The Constitutional provision clearly provides for two alternatives: testimony by two witnesses to the same overt act; confession of the crime by the accused in open court. The accused can secure his conviction only by confession in open court. He cannot be convicted on his testimony to the doing of the overt act so long as that testimony remains something less than a confession.

That petitioner's argument is sound is demonstrated by the history of the two-witness requirement in treason. As stated in petitioner's main brief (p. 21), this requirement is first found in the English statutes 1 Edward VI C. 12, § 22 and 5, 6 Edward VI, C. 11, § 12. 1 Edward VI provided in part that no person should be convicted of high treason, "unless the same offender, speaker, offenders or speakers, be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same." 5 and 6 Edward VI so far as it pertained to the two-witness rule provided as follows:

> "Provided always, and be it enacted by the authority aforesaid, That no person or persons, after the first day of *June* next coming, shall be indicted, arraigned, condemned, convicted or attainted for any of the treasons or offences aforesaid, or for any other treasons that now be, or hereafter shall be, which shall hereafter be perpetrated, committed or done,

unless the same offender or offenders be thereof accused by two lawful accusers; (2) which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that they have to say against the said party, to prove him guilty of the treasons or offences contained in the bill of indictment laid against the party arraigned; unless the said party arraigned shall willingly without violence confess the same; * * *."

The characterization of the two required witnesses as "accusers", and the requirement that they be brought before the party accused, would certainly seem to indicate that one of the two required witnesses cannot be the accused himself.

While the later English statute, 7 William III, does not use the same language as the prior statutes, there is no indication in the cases or in the texts that this statute changed the rule with regard to the identity of the witnesses required. This statute, in so far as it sets forth the two-witness rule, provides as follows:

"And be it further enacted, That from and after the said five and twentieth day of *March*, in the year of our Lord one thousand six hundred ninety six, no person or persons whatsoever shall be indicted, tried or attainted, of high treason, whereby any corruption of blood may or shall be made to any such offender or offenders, or to any the heir or heirs of any such offender or offenders, or of misprision of such treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; unless the party indicted, and arraigned, or tried, shall willingly, without violence, in open court, confess the same, or shall stand mute, or refuse to plead, or in cases of high treason shall peremptorily challenge above the number of thirty five

of the jury; any law, statute, or usage, to the contrary notwithstanding."

Since this statute permitted one witness to establish one overt act, and another witness another overt act of the same treason (a provision not adopted in this country), it seems clear that it was not intended that the accused should by his own testimony establish an overt act, especially in view of the particularity with which the statute sets forth the acts in open court by which the accused could secure his conviction.

IV.

In conclusion, we ask the Court's consideration of each and every one of the points set forth in the Assignments of Error (R. 460-473), no one of which is waived although not argued *in extenso*. The purport of those not previously adverted to in our briefs is evident on their face, and at least one of them was commented upon in the opinion of the Circuit Court (R. 487-8).

V.

The Judgment Appealed from Should Be Reversed and the Indictment Dismissed or, in the Alternative, a New Trial Ordered.

Dated: New York, March 9th, 1944.

Respectfully submitted,

HAROLD R. MEDINA,
Counsel for Petitioner;
JOHN McKIM MINTON, JR.,
RICHARD T. DAVIS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 13

ANTHONY CRAMER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

BRIEF FOR PETITIONER PURSUANT TO COURT'S ORDER FOR FURTHER ARGUMENT

HAROLD R. MEDINA,
Counsel for Petitioner;
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RICHARD T. DAVIS,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 13

ANTHONY CRAMER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

BRIEF FOR PETITIONER PURSUANT TO COURT'S ORDER FOR FURTHER ARGUMENT

This brief is submitted pursuant to the following order of the Court:

"This case is restored to the docket and assigned for reargument during the first week of argument in the October Term, 1944.

"The Court does not desire further argument on the admissibility of evidence or as to the effect of error, if any, in admitting evidence.

"Further briefs and argument are desired as to the questions raised under the treason clause of the Constitution, particularly as to the meaning of 'treason' and of 'overt act' and as to the requirement that such overt acts be proved by testimony of two witnesses; also as to whether each overt act submitted to the jury complied with constitutional requirements."

I

A consideration of the meaning of the treason of adhering to enemies and overt acts thereof

With respect to the meaning of an overt act of treason, petitioner in his first brief argued that to be sufficient an overt act of treason must openly manifest treason. Petitioner pointed out that any less stringent rule led to the conclusion adopted by the Circuit Court in this case that an overt act in treason had no more significance than an overt act in conspiracy (R. 485). Petitioner argued that on this view of the meaning of overt acts in treason the two witness rule becomes meaningless verbiage and the protection sought to be afforded the accused is mere illusion.

As opposed to the rule advanced by petitioner, respondent argued that a sufficient overt act of treason is an act which is "a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, giving them aid and comfort, and must be related to, and in furtherance of, the accomplishment of the treasonable purpose."

The divergence of these contentions is fundamental, and the question raised goes to the essence of what protection, if any, was sought to be afforded in the Constitution to those accused of the crime of treason, the crime recognized to be the greatest of all crimes. The significance of the two witness rule in treason is basic. Undoubtedly one cannot be convicted of treason without having performed an act that is traitorous. According to petitioner's argument only such an act is an overt act of treason, and a significant protection is provided the accused in the Constitutional provision that such an act must be proved by two witnesses. Respondent, however, argues that the overt act in treason may be an innocent act, and need be connected with the traitorous act only by showing it to have been a

part of the program or course of action which included the traitorous act.

The full force and effect of respondent's contention can best be appreciated by consideration of a hypothetical case. Consider, for example, a case of treason of adhering to enemies of the United States in which the act of treason was that the accused, John Doe, a citizen of the United States, at or about 10 A. M. on the morning of June 1, 1944, attended a meeting at 50 Main Street and there disclosed to enemy agents secret information concerning the armed forces of the United States. This disclosing of military information would of course be an act of treason, and according to petitioner's argument John Doe could be convicted only if two witnesses testified to this act, and there were evidence of a traitorous intent, which evidence might be supplied by the two witnesses to the overt act or by other witnesses. According to respondent, however, the overt acts in such a case might be quite innocuous, and any of the following would in themselves be sufficient overt acts of treason: 1) that John Doe arose at 9 o'clock on the morning of June 1, 1944; 2) that John Doe had breakfast at 9:13 on the morning of June 1, 1944; 3) that John Doe left his home at 9:30 on the morning of June 1, 1944; 4) that John Doe walked down Main Street at 9:45 on the morning of June 1, 1944; 5) that John Doe at 9:55 on the morning of June 1, 1944 rang the door bell at 50 Main Street. On the testimony of one witness (for according to respondent it need not be alleged as an overt act) that John Doe disclosed secret military information to enemy agents at 50 Main Street at 10 o'clock on the morning of June 1, 1944, the acts aforementioned would qualify as sufficient overt acts of treason since they would be shown to be "a part of a program or course of action the purpose and tendency of which are to adhere to the enemy." Peti-

tioner will readily demonstrate, however, that acts of this type were never considered overt acts of treason.

While it seems clear that, in any view of the English and American precedents prior to the Constitutional Convention, none of the overt acts submitted to the jury herein was legally sufficient, we shall, in view of the Court's memorandum, attempt a comprehensive and chronological review of all the precedents, English and American. We shall also attempt to deduce from these precedents what we deem to be the true meanings of "treason" and "overt act" as these words are used in our Constitution.

In this connection, some preliminary observations may be helpful. Most of the treasons known to English law were utterly rejected by the Constitutional Convention, including the treason of compassing and imagining the death of the king, which thoroughly permeated the English law of treason. Those treasons which remained, namely levying war and adhering to enemies, giving them aid and comfort, refer in plain English to the actualities of levying war on the one hand and giving aid and comfort to the enemy on the other. There would seem to be little basis for construction and interpretation which might stretch these simple words and phrases to cover attempts to levy war or attempts to give aid and comfort or conspiracies or other preparations.

The many months of additional research and study which have been made possible by the Court's direction for reargument, especially in the light of the questions asked by every member of the Court on the original argument on March 9, 1944, have served to develop certain new and additional points of view. They have also served to strengthen the conviction that none of the alleged overt acts of treason submitted to the jury herein was legally sufficient.

It was pointed out and strongly urged upon this Court at the time of the first argument that the crime of treason was viewed by the founders of our Government and our Constitution with disfavor, that it should be scrupulously restricted in its operation to cases clearly coming within the constitutional definition and under no circumstances extended to doubtful cases.

We now contend that the constitutional definition of the treason of adhering to enemies, giving them aid and comfort, is plain and unambiguous on its face, that instances of so-called constructive treason of adhering to enemies, giving them aid and comfort, were never intended to be included and that it was the intent to assign to the Legislature for future definition the vast mass of lesser crimes, such as attempts to give aid and comfort, conspiracies, espionage and so on. If we are right about this, each of the three alleged overt acts submitted to the jury herein is plainly insufficient.

In addition, we shall contend that, even taking the view that the actual and constructive treasons of adhering to enemies, giving them aid and comfort, as established by the various English precedents prior to the Constitutional Convention, were intended by the founders to be included by and carried over into the new definition of treason contained in our Constitution, the overt acts submitted to the jury herein are still insufficient.

With reference to the meaning of an "overt act", it is our contention that the only rule supported by certain authority is that the overt act must be an act of treason, that is, it must be such an act as, when coupled with evidence of the accused's owing of allegiance to the United States, and a traitorous intent, would warrant the submission of the case to the jury. None of the alleged overt acts submitted to the jury herein can survive this simple test.

A. *The meaning of the treason of adhering to enemies under the English Statute of Treasons, 25 Edward III (1351).*

Any consideration of the Anglo-American law of treason must begin with the English Statute of Treasons, 25 Edward III (1351),[1] the first English criminal statute,[2] the text of which is herewith set forth.[3] While many treason

[1] Some authorities give 1352 as the date, Pollock and Maitland, *The History of English Law*, 2nd edition (Cambridge 1898), Vol. II, p. 502.

[2] Holdsworth, *A History of English Law*, (3rd Ed., rewritten, Boston, 1923), Vol. III, p. 287.

[3] "A Declaration which Offences shall be adjudged Treason. Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the king, at the request of the lords and of the commons hath made a declaration in the manner as hereafter followeth; that is to say, when a man doth compass or imagine the death of our lord the king, or our lady his queen, or of their eldest son and heir; or if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort, in the realm, or elsewhere, and thereof be proveably attainted of open deed by the people of their condition. And if a man counterfeit the king's great or privy seal, or his money; and if a man bring false money into this realm, counterfeit to the money of England, as the money called Lushburgh, or other like to the said money of England, knowing the money to be false, to merchandise or make payment, in deceit of our said lord the king and of his people; and if a man slea the chancellor, treasurer, or the king's justices of the one bench, or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices. And it is to be understood, that in the cases above rehearsed, that ought to be judged treason which extends to our lord the king, and his royal majesty: and of such treason the forfeiture of the escheats pertaineth to our sovereign lord, as well of the lands and tenements holden of other, as of himself. And moreover there is another manner of treason; that is to say, when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate, to whom he oweth faith and obedience; and of such treason the escheats ought to pertain to every lord of his own fee. And, because that many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason till the cause be showed and

statutes had come and gone between 1351 and the time of the American Constitutional Convention,[4] in times of comparative internal peace the English would reduce all treasons to those enumerated in 25 Edward III.[5] While there were numerous other treason statutes in force in England at the time of our Constitutional Convention,[6] 25 Edward III was the most important one.

It will not be useful here to explore the source of the treasons enumerated in 25 Edward III. Suffice it to say that the source is to be found in Anglo-Saxon tribal law and in the Roman Law of *crimen laesae maiestatis* and

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declared before the king and his parliament, whether it ought to be judged treason or other felony. And if peradventure any man of this realm ride armed covertly or secretly, with men of arms against any other, to slay him, or rob him, or take him, or retain him till he hath made fine or ransom for to have his deliverance, it is not in the mind of the king nor his council, that in such case it shall be judged treason, but shall be judged felony or trespass, according to the laws of the land of old time used, and according as the case requireth."

[4] "But afterwards, between the reign of Henry the Fourth and Queen Mary, and particularly in the bloody reign of Henry the Eighth, the spirit of inventing new and strange treasons was revived; among which we may reckon the offenses of clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; wilfully poisoning; execrations against the king; calling him opprobrious names by public writing; counterfeiting the sign-manual or signet; refusing to abjure the pope; deflowering or marrying, without the royal license, any of the king's children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing* (manifested by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal style and title; and impugning his supremacy; and assembling riotously to the number of twelve, and not dispersing upon proclamation; • • •" Blackstone, *Commentaries on the Laws of England*, Book IV, Chap. VI, [86-87], Wendell's Ed. (N. Y., 1854), pp. 86-87.

[5] 1 Edward 6, Cap. 12 (1547)
1 Mary, Cap. 1 (1553)

[6] See Blackstone, *supra*, Chap. VI, pp. 87 ff.

crimen falsi,' and that the treason of adhering to enemies had been recognized in England long before 1351.[8]

There is little available in the way of general discussion of the meaning of the treason of adhering to enemies. The usual comment is that the phrase "adhering to the king's enemies, giving them aid and comfort" is self-explanatory; that the treason is "adhering to the king's enemies," and that its meaning is explained by the phrase in apposition, "giving them aid and comfort":

> "What shall be said to be an adherence to the king's enemies, &c. this is explained by the words subsequent, 'giving aid and comfort to them;' from which it appears, that any assistance given to aliens in open hostility against the king, as by surrendering a castele of the king's to them for reward, or selling them arms, &c. or assisting the king's enemies against his allies, or cruising in a ship with enemies to the intent to destroy the king's subjects is clearly within this branch."[9]

The treasons of adhering to enemies and levying war were considered closely allied. East states:

> "Thus, every species of aid or comfort, in the words of the statute, which, when given to a rebel within the realm, would make the subject guilty of levying war; if given to an enemy, whether within or without the realm, will make the party guilty of adhering to the king's enemies; though in the case of giving aid to

[7] Pollock and Maitland, *supra*, Vol. II, pp. 502 ff., Holdsworth, *supra*, Vol. III, pp. 287-290.

[8] Levying war was the newest of the treasons (Pollock and Maitland, *supra*, p. 505), and was probably not treason before 25 Edward III. Holdsworth, *supra*, Vol. III, p. 461.

[9] Hawkins, *Pleas of the Crown*, Book I, Chapter 2, section 28, see also Coke, *The Third Part of the Institutes of the Laws of England*, cap. 1, sec. 10.

enemies within the realm, a subject might in some instances be brought within both branches of the act."[10]

The treasons of compassing the king's death, levying war against him, and adhering to his enemies, as set forth in 25 Edward III, had undergone constructive extension by the time of the American Constitutional Convention.

While there is nothing in the early authorities to indicate that 25 Edward III, in its specification of the treason of adhering, intended anything less than an actual giving of aid and comfort to the enemy, the English judges of the 17th and 18th centuries found occasion to make trials for treason such a frightful means of oppression that our founders established an entirely new pattern. The evolution of the law of constructive treason in England is thus of peculiar significance.

There was an obvious reason for making the underlying and basic treason that of compassing and imagining the death of the king rather than the actual killing of the king. The "king's personal, individual authority was the mainspring of the government"[11] and this would have been completely destroyed had it been necessary, in order to commit this species of treason, to put an end to the king's life. The provision to this effect, however, was clear and specific and not a matter of construction or extension.

The first step in the direction of construction apparently came when someone discovered that plotting to do an act which might possibly have the effect of injuring the king might be alleged as an act of compassing and imagining the death of the king, even though nothing could have been

[10] East, *Pleas of the Crown*, (Phila., 1806), Chapter II, sec. 21, p. 58. See also Foster, *Crown Cases* (London, 1792), Chapter II, sec. 8, p. 216. Foster also states that "Furnishing rebels or enemies with money, arms, ammunition or other necessaries will, *prima facie*, make a man a traitor," *supra*, Chapter II, sec. 8, p. 217.

[11] Stephen, *A General View of the Criminal Law of England* (London and Cambridge, 1863) p. 37.

further from the thought of the accused than the killing of the king. Any sort of giving of aid and comfort to the enemy could be said to have the possible effect of injuring the king. Thus it came about that the common form of indictment for treason charged the same overt acts as a treason of adhering to enemies, giving them aid and comfort, and at the same time as a treason of compassing and imagining the death of the king. In this way the treason of adhering to the king's enemies lost some of its meaning and distinction through its constant association with the treason of compassing and imagining the death of the king, a circumstance noted by Judge Learned Hand in *United States* v. *Robinson*, 259 Fed. 685 (D. C., S. D. N. Y., 1919), at p. 690.

This serves to explain the curious phenomenon that in the early 18th century the English judges held that there might be a treason of adhering to enemies, giving them aid and comfort, although no aid and comfort was given. Doubtless influenced by the treason of compassing and imagining, where plainly no fulfillment of the traitorous design was required, the English judges held that a mere attempt to give aid and comfort was sufficient.

As we shall see (*infra*, p. 18), this question was raised in *Rex* v. *Vaughan*, [1696] 13 How. St. Tr. 485.[12] The point was most frequently involved, however, in cases in which the accused had sent letters containing military information to the enemy, which letters were intercepted. In such cases the following statement of Lord Mansfield in *Rex* v. *Henson*, [1758] 19 How. St. Tr. 1341, 1344, is usually cited:

> "Letters of advice and correspondence, and intelligence to the enemy, to enable them to annoy us or defend themselves, written and sent, in order to be delivered to the enemy, are, though intercepted, overt acts of both these species of treason that have been men-

[12] All references to Howell's *State Trials* are to the octavo edition.

tioned [adhering and compassing]. And this was determined by all the judges of England, in Gregg's case: where the indictment (which I have seen) is much like the present indictment. The only doubt, there, arose from the letters of intelligence being intercepted and never delivered; but they held 'that that circumstance did not alter the case.'"

Why a mere attempt to aid the enemy should have been held to constitute the treason of rendering the enemy aid and comfort is far from clear. The question is sometimes dismissed in the cases with the statement that the accused did all that he could to aid the enemy.[13] But the reason generally given is that if treason consisted only of successfully aiding the enemy, such success might annihilate the only institution which could punish the offense.[14] It does not seem to have been apparent to the English judges, as it was to Chief Justice Marshall in *Ex Parte Bollman*, 4 Cranch 75, 125-127, 8 U. S. 75, 125-127, *infra*, pp. 31-32, that it lay within the power of the legislature to make crimes of offenses which were something short of treason, or, if this was apparent to them, it can only be said that the English judges were notoriously sympathetic to constructive extension of the law of treason.

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[13] For example, see *Rex* v. *O'Coigly, et al.*, [1798] 26, 27 How. St. Tr. 1191, 1195; see also Foster, *supra*, Chap. II, sec. 8, p. 217.

[14] For example, Lord Justice Chamberlain in *Rex* v. *Hart*, [1796] 26 How. St. Tr. 387, 415:

> "If nothing could be considered treason, which did not succeed, no man could be brought to punishment until the government of this country be subverted, and it would be then too late to call him to account for offences committed against a system which was annihilated by his exertions."

As for the reason for this doctrine in the case of sending a letter, Lord Chief Justice the Earl of Clonmell in *Rex* v. *Jackson*, [1794] 25 How. St. Tr. 783, 871, suggests that the obvious reason is that otherwise the letters would get into the hands of the enemy and be unavailable to the prosecution.

Finally, shortly after our Constitutional Convention, it was held in England that meeting with others and consulting or agreeing to do an act which if done would be an act of treason was itself an act of treason.[15]

We do not contend that there is any difference in the basic definition of "giving aid and comfort" to an enemy as understood by the English judges and by the members of the American Constitutional Convention. It meant to the English judges and to our founders as well, giving intelligence to the enemy, furnishing arms, ammunition, money or supplies and so on. In this sense the English precedents furnish guidance just as in the case of the meaning of the treason of "levying war."

What we do contend is that it was never the intention of the founders to adopt and integrate with our simple definition of treason, decisions extending the law by construction so as to cover attempts and abortive conspiracies.

So much for the general discussion of the English treason of adhering to the king's enemies. The specific acts constituting the treason will appear clearly when we consider the various cases in detail.

B. *The meaning of an overt act of the treason of adhering to enemies under the English Statute of Treasons, 25 Edward III (1351).*

While it seems to have been somewhat uncertain in English law to what treasons the words "and thereof be provably attainted by open deed by the people of their condi-

[15] *Rex v. Stone*, [1795] 25 How. St. Tr. 1155; *Rex v. Finney*, [1798] 26 How. St. Tr. 1019; *Rex v. O'Coigly, et al.*, [1798] 26 How. St. Tr. 1191; *Rex v. Henry and John Sheares*, [1798] 27 How. St. Tr. 255; *Rex v. McCann*, [1798] 27 How. St. Tr. 399; *Rex v. Burne*, [1798] 27 How. St. Tr. 455; *Rex v. Bond*, [1798] 27 How. St. Tr. 523.

tion" in 25 Edward III applied to,[16] it is certain that they applied to the treason of adhering to the king's enemies.

That only an act of treason as defined by us (*supra*, pp. 2, 3, 5) was originally meant to be a sufficient overt act of treason is manifest from the wording of 25 Edward III itself. The statute states "and thereof be provably attainted by open deed • • •." This can only mean that the treason insofar as it consists of an act must be proved by the overt act.[17] Foster [18] and East [19] state that the overt

[16] Some of the text writers state that the phrase refers to all the treasons which precede it. Hale, *Pleas of the Crown* (Ed. Wilson, Dublin, 1778), Chapter XIII, section IV, Vol. 1, p. 108; East, *supra*, Chapter II, sec. 54, Vol. I, p. 116. But it is doubtful that it applied to violation of the king's companion, etc. Coke seems to state that it applies only to the treasons of compassing the death of the king, etc., and adhering to his enemies, *supra*, Cap. I, sections 3, 4. In *Regina* v. *Purchase*, [1710]. 15 How. St. Tr. 651, it was held that no overt act need be alleged in an indictment for the treason of levying war, but that nevertheless the indictment must state the facts constituting the levying of war. See East, *supra*, Chapter II, sec. 54, Vol. I, pp. 116-117.

[17] Of this phrase, Coke states, in part, *supra*, Cap. 1, Section 12:

"(16) *Et de ceo provablement soit attaint per overt fait, per gents de lour condition.*] In this branch four things are to be observed, first this word [*provablement*] provably, that is upon direct and manifest proof not upon conjecturall presumptions, or inferences, or strains of wit; but upon good and sufficient proofe. And herein the adverb [provablement] provably, hath of great force, and signifieth a direct and plain proof, which word the king, the lords, and the commons in parliament did use, for that the offence was so hainous, and was so heavily, and severely punished, as none other the like and therefore the offender must provably be attainted, which words are as forcible, as upon direct and manifest proof. Note, the word is not (probably) for then *commune argumentum* might have served, but the word is [*provably,*] be attainted. • • • 3. *Per overt fait,*] *per apertum factum.* This doth also strengthen the former exposition of the word (provablement,) that it must be provably, by an open act, which must be manifestly proved."

[18] "The words of the statute descriptive of the offence must be strictly pursued in every indictment for this species of treason [compassing the king's death]. It must charge, that the defendant did traiterously *compass* and *imagine* &c., and then go on and charge the several overt acts as the means employed by the defendant for executing his traiterous purposes. For the compassing is considered as the treason, the overt

act is the means employed to accomplish the treason. For the reason that the overt act went to the heart of the charge against which the accused must make his defense, the statute 7 William III, c. 3, sec. 8 (1695), provided especially that "no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever."[20] It is stated in Halsbury's, *The Laws of England*, Vol. 9, p. 456, that "The treason alleged must be proved by overt acts, and the overt acts upon which it is intended to rely must be expressly alleged in the indictment, and must be proved, and no evidence is admissible of any overt act that is not so alleged unless it affords direct proof of any of the overt acts that are laid."

Blackstone says of the treason of adhering to the king's enemies, "This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, and the like" (see petitioner's first brief, p. 25). These, it will be remembered, are the acts which Hawkins and Foster stated to constitute the treason of adhering to the king's enemies (see *supra*, pp. 8, 9 fn.).

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acts as the means made use of to effectuate the intentions and imaginations of the heart. * * *" Foster, *supra*, Chapter I, sec. 1, pp. 193 194.

[19] "In every indictment for high treason upon the st. 25 Ed. 3, for compassing the death of the king, or of such of his family as are therein named, or for levying war, or adhering to his enemies, the particular species of treason must be charged in the very terms of the statute, being a declaratory law, as the substantial offence, and then some overt act must be laid as the means made use of to effectuate the traitorous purpose." East, *supra*, Chap. II, sec. 54, Vol. I, p. 116.

[20] East states that while this was generally the common law rule "some high authorities did seem to countenance a contrary doctrine; which justifies the caution and wisdom of parliament in securing the observance of the rule by a legislative provision." *Supra*, Chapter II, sec. 56, Vol. I, p. 121.

The first fully reported case petitioner finds of the treason of adhering to the king's enemies is *Lord Preston's* case, [1691] 12 How. St. Tr. 646, which was considered at some length in the first briefs submitted to this Court. It will be remembered that at a time when England was at war with France, Lord Preston was apprehended in a boat on its way to France, and there was found in his custody, papers, some of them in his handwriting and bearing his seal, informing the French how they could best invade England. All it was proved that Lord Preston did in the County of Middlesex, where the indictment was laid, was to board a wherry in order to get out to the ship that was to take him to France. On his trial Lord Preston objected that no overt act had been proved in Middlesex. But Lord Chief Justice Holt overruled the objection, and in his charge to the jury spoke as follows:

> "Ay, but gentlemen, give me leave to tell you, if you are satisfied upon this evidence that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen, and make use of the papers to that end, then every step he took in order to it, is high treason, wherever he went; his taking water at Surrey stairs in the county of Middlesex, will be as much high-treason, as the going aship-board in Surrey, or being found on ship-board in Kent, where the papers were taken."

In its first brief respondent claimed that this case supports its contention that an innocent act, as distinguished from an act which is itself treason if done with the requisite intent, could be an overt act of treason. Petitioner took the position that the case stood for the proposition that if the jury found that a proper overt act of treason had been proved, it might then, and only then, consider proof of any

steps taken in preparation for that act as proof of an overt act of treason. Petitioner cited Holdsworth's comment on the case:

> "It comes to this—every act, however remotely connected with an overt act of compassing the king's death, is itself an overt act." Holdsworth, *History of English Law*, Vol. 8, p. 317.

The indictment tends to confirm petitioner's contention. The third overt act of adhering to the king's enemies reads as follows:

> "And that your the said sir Richard Grahme, John Ashton, and Edmund Elliot, during the war aforesaid, to wit, the aforesaid 30th day of December now passed, at the parish of St. Clement Danes, in the county aforesaid, concerning, and for the same your treasons and traiterous adherings and purposes aforesaid to execute and fulfil, maliciously, traiterously, and advisedly, then and there did hire and prepare, and then and there did cause and procure to be hired and prepared a certain boat, and one man to the jurors unknown, you the said sir Richard Grahme, John Ashton, and Edmund Elliot, from thence to and into the ship aforesaid, by you as aforesaid hired and prepared to carry and convey; and that you the said sir Richard Grahme, John Ashton, and Edmund Elliot, maliciously and traiterously into the same boat, then and there did enter, and yourselves from thence secretly in and by the same boat unto and into the same ship, then and there did cause and procure to be carried, in prosecution of the adhering aforesaid. And you the said sir Richard Grahme, John Ashton, and Edmund Elliot, then and there with the same traiterous letters, notes, memorandums, and instructions in writing, in your custody and possession being, during the war aforesaid, to wit, the same day and year, in and with the ship aforesaid did sail, and depart towards the aforesaid kingdom of France, to the intent the same traiterous letters, notes, memorandums, and instructions in writing, in parts beyond the seas, to the said enemies of our

said lord and lady, the king and queen that now are, to deliver, concerning and for aid, intelligence, and council, by you the said sir Richard Grahme, John Ashton, and Edmund Elliot, to the same enemies of our said lord and lady, the king and queen that now are, to give and yield, during the war aforesaid, against the duty of your allegience, against the peace of our said sovereign lord and lady, the king and queen that now are, their crown and dignity, and against the form of the statute in that case made and provided."

In this overt act it is alleged that Lord Preston departed on the ship towards France carrying with him the traitorous letters, etc. This, according to English law, was an act of treason. In the same overt act it is alleged that Lord Preston entered the wherry for the purpose of boarding the ship which was to take him to France. Thus the act of boarding the wherry is alleged to have been preparatory to the act of treason.

The next case is *Rex* v. *Vaughan*, [1696] 13 How. St. Tr. 485. The indictment charged Captain Vaughan with the treasons of levying war against the king and adhering to his enemies, although the count principally relied upon was that of adhering to the king's enemies. Vaughan had accepted a commission from the French king to command a small ship of war, or barge, called the Loyal Clencarty. This barge was manned by a number of foreigners including fifteen Frenchmen; it was filled with arms and ammunition and a large quantity of hand grenades, such as were used to start fires on enemy vessels. Captain Vaughan manoeuvered his barge around one of the British vessels of war, with the evident intent of boarding her; the following day the British vessel gave chase and Vaughan and his men together with the barge and its contents were captured as they tried to get away.

One of the overt acts of adhering to the king's enemies, giving them aid and comfort, was the charge of "cruising to several maritime places within the jurisdiction aforesaid,

by force and arms to take the ships, goods and money of our said lord the king and his subjects." The Latin version of the indictment, which appears in 13 How. St. Tr. pp. 490-1, shows that the charge was not merely cruising but cruising "with the aforesaid enemies of our said lord the king, in the aforesaid small ship of war, called the Loyal Clencarty." The indictment as a whole makes it perfectly evident that no innocent interpretation could possibly be given to the presence of this French ship of war in English waters, filled with munitions of war and Frenchmen armed to the teeth.

Captain Vaughan had admitted that he came to burn the king's ships and the French commission giving him command of the vessel was spread upon the record in full (pp. 535-6). The defense in substance was that Vaughan was a Frenchman but the evidence that he was an Irishman was amply sufficient to justify the submission of this question of fact to the jury.

The point raised by counsel was that the overt act of mere cruising was insufficient as there was no charge nor any proof that any of the king's ships had been boarded, seized or burned.

While the case is sometimes cited for the proposition that the treasonable design need not have been successfully accomplished to constitute treason, a careful examination of the full report shows that the point was not necessarily involved as it seems plain that there is an adherence to the king's enemies, giving them aid and comfort, when an Englishman accepts a commission to command a French war vessel in time of war and is found in actual command of the vessel and of certain armed enemy subjects in waters under the jurisdiction of the English admiralty.

The comment of one of the Lord Justices on this subject seems conclusive (pp. 532-3):

"L. C. J. *Treby*. The indictment is laid for adhering to, and comforting and aiding the king's enemies. You would take that to be capable to be construed adhering to the king's enemies in other respects; but I take it to be a reasonable construction of the indictment, to be adhering to the king's enemies in their enmity. What is the duty of every subject? It is to fight with, subdue, and weaken the king's enemies; and contrary to this, if he confederate with, and strengthen the king's enemies, he expressly contradicts this duty of his allegiance, and is guilty of this treason of adhering to them. But then you say here is no aiding unless there were something done, some act of hostility. Now here is going aboard with an intention to do such acts; and is not that comforting and aiding? Certainly it is. Is not the French king comforted and aided, when he has got so many English subjects to go a cruising upon our ships? Suppose they man his whole fleet, or a considerable part of it; is not that aiding? If they go and enter themselves into a regiment, list themselves and march, though they do not come to a battle, this is helping and encouraging; such things give the enemy heart and courage to go on with the war; or else it may be, the French king would come to good terms of peace. It is certainly aiding and comforting of them to go and accept a commission, and enter into their ships of war, and list themselves, and go out in order to destroy their fellow subjects, and ruin the king's ships; these are actings of an hostile nature. And if this be not adhering, &c. it may as well be said, that if the same person had made an attack upon our ships, and miscarried in it, that had not been so neither; because that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy. And after this kind of reasoning they will not be guilty, till they have success; and if they have success enough, it will be too late to question them."

The further statement of Lord Chief Justice Treby at page 498, relative to overt acts is also interesting:

> "Nevertheless, I think an overt act ought to be alleged in an indictment of treason for adhering to the king's enemies, giving them aid and comfort. And the overt act or acts, in this case, ought to be the particular actions, means, or manner by which the aid and comfort was given."

The cases of *Rex* v. *Freind*, [1696] 13 How. St. Tr. 1; *Rex* v. *Parkyns*, [1696] 13 How. St. Tr. 63, and *Rex* v. *Cook*, [1696] 13 How. St. Tr. 311, while containing allegations of adhering to the enemy, are not helpful. The same overt acts are alleged for the treasons of compassing the king's death and adhering to his enemies, and in one count, and it is impossible to know what acts were relied on for the respective treasons. In *Rex* v. *Freind* and *Rex* v. *Parkyns* Lord Chief Justice Holt submitted only the treason of compassing the king's death to the jury. In *Rex* v. *Cook*, Lord Chief Justice Treby, in summing up to the jury, mentions that the accused is indicted for two types of treason. But after enumerating the overt acts he states only that they are proper overt acts of compassing the king's death.

The next case is *Regina* v. *Gregg*, [1708] 14 How. St. Tr. 1371. The indictment is not set forth in the reports, but the following statement appears at pp. 1371-1375:

> "The Post-master of Brussels discovered a correspondence between Mr. Secretary Harley's office and the French, and communicated his knowledge to the government here; whereupon Mr. William Gregg, a clerk in that office, was taken into custody of a messenger, and, after several examinations before the counsel, was committed to Newgate, and on the 19th of January was indicted of high treason for compassing the death of the queen, and also for adhering to her enemies. The indictment imported, That he had sent letters to Monsieur Chamillard, one of the French king's prime ministers, particularly one dated the 28th of November last, and others, wherein were en-

closed the proceedings of both Houses of Parliament, in relation to the augmentation of our forces; also a copy of a letter from the queen to the emperor, and copies of private business sent to the duke of Savoy,' &c. To which indictment Gregg pleaded Guilty; and the recorder pronounced sentence of death upon him."

The next case is *Rex* v. *Hensey*, [1758] 19 How. St. Tr. 1341.[21] Dr. Hensey was indicted for the treasons of compassing the king's death and adhering to his enemies at a time when England was at war with France. Again the indictment is not set forth in the reports, but from the report of Lord Mansfield's statement at the close of the case (pp. 1346-1348) it is evident that the overt act consisted of sending letters containing information concerning the English army and navy, and government finance, to the enemy in France. The letters were intercepted.

The next case is *Rex* v. *De La Motte*, [1781] 21 How. St. Tr. 687. De La Motte, a French subject, was indicted, and in separate counts, for the treasons of compassing and imagining the death of the king and adhering to his enemies. The overt acts are chiefly the usual ones of sending military information to the French, which were held to be sufficient overt acts of adhering to enemies in the *Gregg* case and the *Hensey* case just above referred to.

The only other English case which petitioner has found of the treason of adhering to enemies prior to the American Constitutional Convention is *Rex* v. *Tyrie*, [1782] 21 How. St. Tr. 815. Tyrie was indicted for the treasons of compassing and imagining the death of the king, and adhering to his enemies, at a time when England was at war with France. The overt acts alleged in his indictment are

[21] While the Solicitor-General in *Rex* v. *Townley*, [1746] 18 How. St. Tr. 330, states at p. 346 that the treason of adhering is involved, the indictment (pp. 333-334) does not bear him out.

substantially the same as those alleged in *De La Motte's* case.

As for the English cases of the treason of adhering to the king's enemies, tried after the American Constitutional Convention,[22] they fall within the scope of those we have already discussed. In practically all these cases the same overt acts are alleged for the treason of adhering and also for the treason of compassing and imagining. The only development of any significance is the further development of the law, as above set forth, to the effect that meeting with others and consulting or agreeing to do an act, which if done would be an act of treason, was itself an act of treason. (See footnote 15, *supra*.)

One of these cases, *Rex* v. *Maclane*, [1797] 26 How. St. Tr. 721, was relied upon by respondent and discussed in the Government's first brief at pages 35, 40 and 48. There were numerous overt acts which were obviously sufficient, including raising men to levy war against the king, conveying arms and ammunition into the province for the purpose of waging war against the king and so on, as pointed out in our reply brief, page 5. The Court did charge that it was not necessary for conviction to establish that defendant succeeded in his design. This ruling

[22] *Rex* v. *Jackson*, [1794] 25 How. St. Tr. 783; *Rex* v. *Stone*, [1795] 25 How. St. Tr. 1155; *Rex* v. *Weldon*, [1795] 26 How. St. Tr. 226; *Rex* v. *Maguire*, [1795] 26 How. St. Tr. 293; *Rex* v. *Leary*, [1795] 26 How. St. Tr. 295; *Rex* v. *Kennedy*, [1796] 26 How. St. Tr. 352; *Rex* v. *Hart*, [1796] 26 How. St. Tr. 387; *Rex* v. *Maclane*, [1797] 26 How. St. Tr. 721; *Rex* v. *Finney*, [1798] 26 How. St. Tr. 1019; *Rex* v. *O'Coigly, O'Connor, Binns, Allen and Leary*, [1798] 26 How. St. Tr. 1191 (cont. in Vol. 27); *Rex* v. *Henry and John Sheares*, [1798] 27 How. St. Tr. 255; *Rex* v. *McCann*, [1798] 27 How. St. Tr. 399; *Rex* v. *Byrne*, [1798] 27 How. St. Tr. 455; *Rex* v. *Bond*, [1798] 27 How. St. Tr. 523; *Rex* v. *Lone*, [1798] 27 How. St. Tr. 613; *Rex* v. *Emmet*, [1803] 28 How. St. Tr. 1097; *Rex* v. *Lynch*, [1903] 20 Cox C. C. 468; *Rex* v. *Ahlers*, [1915] 1 K. B. 616; *Rex* v. *Casement*, [1917] 1 K. B. 98—See *The Trial of Sir Roger Casement* (Ed. by Knott, 1917).

was supported by other English decisions prior to the American Constitutional Convention and, as indicated in the footnote on page 5 of our reply brief, it was our belief at the time of the first argument of this case that these English cases were sufficiently binding as precedents.

As indicated in the preliminary portion of this brief, further study and reflection has convinced us that the elimination of the English treason of compassing and imagining and the entirely new pattern of the definition of treason in our Constitution makes it extremely doubtful that the founders ever intended that a mere attempt or abortive conspiracy should be sufficient to establish the treason of adhering to enemies, giving them aid and comfort, despite the English authorities to the contrary and one or two American dicta,[23] none of which bear evidence of the serious consideration which the point seems to deserve.

What is the modern English view of an overt act of the treason of adhering to enemies, giving them aid and comfort? We have been unable to find any guidance except such as appears in *Rex* v. *Casement*, [1917] 1 K. B. 98 (See the *Trial of Sir Roger Casement*, ed. by Knott, 1917). As stated in petitioner's first brief, p. 30, the overt acts charged were all of such a character as, in and of themselves, to import a treasonable purpose. While respondent states that the definition of overt acts as there charged by Lord Chief Justice Reading is "equivocal and unilluminating" (respondent's first brief, p. 49), we do not think this characterization is justified. Judge Learned Hand, who quoted this definition in *United States* v. *Robinson*, 259 Fed. 685 (D. C., S. D. N. Y., 1919) hereinafter referred to, (*infra*, p. 36), found it to be most in accord with his under-

[23] *United States* v. *Pryor*, 27 Fed. Cas. No. 16,096 (C. C., D. Pa., 1814). *United States* v. *Greathouse, et al.*, 26 Fed. Cas. No. 15,254 (C. C., N. D. Calif., 1863).

standing of the law. Lord Chief Justice Reading charged as follows:

> "Overt acts are such acts as manifest a criminal intention and tend toward the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled."

We have been unable to find any published records of treason prosecutions in England during the present war; and it is our information that such prosecutions as have taken place have been pursuant to the terms of a variety of statutory provisions such as are contained in Title 50 of the *United States Code*, Chapter 4, which defines and provides for the punishment of numerous acts under the heading of "Espionage". This chapter, and particularly Section 32 thereof, is hereinafter referred to in connection with our argument addressed to overt act 10 (*infra*, p. 46).

C. *The meaning of the treason of adhering to enemies, and overt acts thereof, in the American States prior to the Constitutional Convention.*

The crime of treason is not defined in any of the constitutions enacted by the various American States between the time of the Declaration of Independence and the meeting of the Constitutional Convention of the United States.[24] Nor is treason defined in the Articles of Confederation, where the only reference to it is the provision in Article IV providing for the extradition of one guilty of or charged with treason.

But there was in this period a very significant enactment. On February 11, 1777, the Assembly of the State of Penn-

[24] See F. N. Thorpe, *The Federal and State Constitutions*, (Washington, 1909). Some of them, like the Massachusetts Constitution of 1780, had a provision that no subject ought to be declared guilty of treason by the legislature. See Thorpe, *supra*, Vol. 3, p. 1892.

sylvania passed a statute concerning treason. That statute reads as follows:[25]

AN ACT DECLARING WHAT SHALL BE TREASON AND WHAT OTHER CRIMES AND PRACTICES AGAINST THE STATE SHALL BE MISPRISON OF TREASON.

(Section I, P.L.) Whereas it is absolutely necessary for the safety of every state to prevent as much as possible all treasonable and dangerous practices that may be carried on by the internal enemies thereof and to provide punishments in some degree adequate thereto, in order to deter all persons from the perpetration of such horrid and dangerous crimes:

Therefore:

[Section I] (Section II, P.L.) Be it enacted, and it is hereby enacted by the Representatives of the Freemen of the Commonwealth of Pennsylvania in General Assembly met, and by the authority of the same, That all and every person and persons (except prisoners of war) now inhabiting, residing or sojourning within the limits of the state of Pennsylvania or that shall voluntarily come into the same hereafter to inhabit, reside or sojourn, do owe and shall pay allegiance to the state of Pennsylvania.

[Section II] (Section III, P.L.) And be it further enacted by the authority aforesaid, That if any person or persons belonging to or residing within this state and under the protection of its laws shall take a commission or commissions from the King of Great Britain, or any under his authority or other the enemies of this state or the United States of America, or who shall levy war against the state or government thereof, *or knowingly and willingly shall aid or assist any enemies at open war against this state, or the United States of America, by joining their armies or by enlisting or procuring or persuading others to enlist for that purpose, or by furnishing such enemies with arms or*

[25] See *The Statutes at Large of Pennsylvania* [1776-1777], 45-47.

ammunition, provision or any other article or articles for their aid or comfort, or by carrying on a traitorous correspondence with them, or shall form or be anywise concerned in forming any combination, plot or conspiracy for betraying this state or the United States of America into the hands or power of any foreign enemy; or shall give or send any intelligence to the enemies of this state for that purpose, every person so offending and being thereof legally convicted by the evidence of two sufficient witnesses in any court of oyer and terminer shall be adjudged [guilty] of high treason and shall suffer death, and his or her estate shall be and is hereby declared to be forfeited to the commonwealth, except such parts thereof as the judges of the court wherein such conviction may be shall order and appropriate to the support of such traitor's children or wife and children (if any) as to them may appear sufficient until the same shall be otherwise regulated by act of general assembly.

[Section III] (Section IV, P. L.) And be it further enacted by the authority aforesaid, That if any person or persons within this state shall attempt to convey intelligence to the enemies of this state or the United States of America, or by publicly and deliberately speaking or writing against our public defense, or shall maliciously and advisedly endeavor to excite the people to resist the government of this commonwealth or persuade them to return to a dependence upon the crown of Great Britain, or shall maliciously and advisedly terrify or discourage the people from enlisting into the service of the commonwealth, or shall stir up, excite or raise tumults, disorders or insurrections in the state or dispose them to favor the enemy, or oppose and endeavor to prevent the measures carrying on in support of the freedom and independence of the said United States, every such person being thereof legally convicted by the evidence of two or more creditable witnesses in any court of general quarter sessions shall be adjudged guilty of misprison of treason and shall suffer imprisonment during the present war, and

forfeit to the commonwealth one-half of his or her lands and tenements, goods and chattels.

[Section IV] (Section V, P. L.) And be it further enacted by the authority aforesaid; That all offenses by this act declared misprison of treason shall be cognizable before any justice of the peace of the city or county where the offense was committed or where the offender can be found, and every justice of the peace within this state on complaint to him made on oath or affirmation of one or more credible person or persons shall cause such offender to come before him and enter into a recognizance with one or more sufficient surety or sureties to be and appear at the next court of general quarter sessions for the said city or county and abide the judgment of the court, and in the meantime to be of the peace and good behavior toward all people in the state, and for want of such surety the said justice shall commit such offender to the common gaol of the said city or county. And all persons charged on oath or affirmation with any crime or crimes by this act declared to be treason against the state shall be dealt with and proceeded against as in other capital crimes are [sic] [is] by law directed." [Italics supplied.]

This statute, in so far as it concerns the treason of adhering to enemies, is of great interest and significance. In the first place, it defines specifically those acts which when done with traitorous intent will constitute treason. Other enumerated acts are made misprision of treason. Apparently only successful acts were intended to constitute treason since an attempt to convey intelligence to the enemy, an act of treason in England, is here made misprision of treason. Here then the crime of the treason of adhering to enemies is made more definite and certain and it is explicitly limited to those specific acts of adhering which plainly give aid and comfort to the enemy and which are deemed most threatening to the safety and existence of the state.

More significant still is the provision with respect to proof of the crime. The acts constituting the treason of adhering to enemies are enumerated, and then the statute provides: "every person so offending and being thereof legally convicted by the evidence of two sufficient witnesses in any court of oyer and terminer shall be adjudged [guilty] of high treason and shall suffer death * * *." The term "overt act" is omitted, and instead it is provided that the accused can be convicted only on the testimony of two witnesses to the act which constitutes the treason. This was not an attempt to change the English requirement of proof of an overt act in treason. While the Pennsylvania statute omits the term "overt act," it restates the overt act requirement in accordance with the long-standing English understanding of the term, namely, that it is the act of treason that must be proved by two witnesses. In the cases tried in Pennsylvania under this statute reference is continually made to "overt acts."[26]

This then was the first American reaction to the English law of treason; and it was not a short-lived one since the present statute of the State of Tennessee with respect to treason is copied practically verbatim from the Pennsylvania Statute of 1777.[27]

D. *The meaning of the treason of adhering to enemies, and overt acts thereof, under the Constitution of the United States.*

The Constitutional provision with respect to treason, Article III, Section 3, reads as follows:

> "Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the

[26] *Respublica* v. *Malin*, 1 Dall. 33 (1778); *Respublica* v. *Carlisle*, 1 Dall. 35 (1778); *Respublica* v. *Roberts*, 1 Dall. 39 (1778).

[27] Williams, *Tennessee Code Annotated*, § 11004.

Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

The proceedings at the Constitutional Convention concerning the law of treason were referred to in petitioner's first brief at page 22, and in respondent's first brief at pages 37, 38.

Because the Constitutional provision adopts the English statement of the treason of adhering to enemies, and includes the overt act requirement, the first question is whether, and to what extent, the Constitutional Convention intended to adopt the English precedents defining these terms. It is obvious that the Convention, like the Pennsylvania Assembly, was not well disposed to the English law of treason. Of the numerous treasons current in England it retained but two. Nor did it adopt the English law with respect to proof of the overt act. The statute of 7 William III. (1695) provided, and it had been settled law prior to the statute,[28] that one accused of treason could be convicted on the testimony of one witness to one overt act and one witness to another overt act of the same treason. The Constitutional provision is that there must be two witnesses to the same overt act. Again, in England it was clear that there were no accessories in treason; all were principals.[29] That this could be so under the Constitution is doubtful.[30] Furthermore, the Convention made it impossible that treason should be punished as heavily as it was in England by providing that forfeiture and corruption of blood should not

[28] See East, *supra*, Vol. I, Chap. II, sec. 65.

[29] East, *supra*, Vol. I, Chap. II, sec. 35.

[30] See Chief Justice Marshall in *U. S. v. Burr*, 25 Fed. Cas. No. 14,693 (C. C., D. Va. 1807), p. 161.

be a consequence of attainder of treason except during the life of the person attainted. Finally, by virtue of defining treason in the Constitution, the Convention placed revision of that definition beyond the scope of the ordinary legislative process. In England, of course, the crime could in anywise be regulated by act of Parliament.

Where treason was later defined in the State constitutions, the provision of the Federal Constitution was generally copied,[31] indicating thorough agreement to avoid the English experience.

[31] The definition of treason, and the method of proof thereof, provided for in the Federal Constitution was copied in the following constitutions (page references are to Thorpe, *supra*): Alabama Constitution of 1819, p. 108; Arkansas Constitution of 1836, p. 284; Colorado Constitution of 1876, p. 467; Connecticut Constitution of 1818, p. 536; Delaware Constitution of 1792, p. 574; Florida Constitution of 1838, p. 680; Georgia Constitution of 1868, p. 824; Idaho Constitution of 1889, p. 929; Kansas Constitution of 1857, p. 1215; Kentucky Constitution of 1792, p. 1272; Louisiana Constitution of 1812, p. 1388; Maine Constitution of 1819, p. 1648; Michigan Constitution of 1835, pp. 1931-1932; Minnesota Constitution of 1857, p. 1992; Mississippi Constitution of 1817, p. 2044; Missouri Constitution of 1820, p. 2164; Montana Constitution of 1889, p. 2302; Nebraska Constitution of 1866-1867, p. 2350; New Jersey Constitution of 1844, p. 2600; North Carolina Constitution of 1868, p. 2816; Oklahoma Constitution of 1907, p. 4274; Oregon Constitution of 1857, p. 2999; Texas Constitution of 1845, p. 3560; West Virginia Constitution of 1861-1863, p. 4016, Wisconsin Constitution of 1848, p. 4078;

In a number of state constitutions, treason is defined as levying war against the state, "or adhering to its enemies, or in giving them aid and comfort." California Constitution of 1849, p. 392; Indiana Constitution of 1816, p. 1070; Iowa Constitution of 1846, p. 1124; Nevada Constitution of 1864, p. 2404; North Dakota Constitution of 1889, p. 2856; South Dakota Constitution of 1889, p. 3371; Utah Constitution of 1895, p. 3704; Washington Constitution of 1889, p. 3975; Wyoming Constitution of 1889, p. 4119. In the South Carolina Constitution of 1895, the words "adhering to its enemies" are omitted, but giving aid and comfort to the enemy is made treason.

States having no constitutional provision concerning treason have statutes defining the crime, generally in the language of the Federal Constitution. By statute in New Hampshire and Vermont, conspiring to levy war is treason. The New York statute makes treasonable a combination of two or more persons to usurp or overthrow the government by force, shown by a forcible attempt. Virginia has a somewhat similar provision, but it does not require a combination. New York does not require proof of an overt act by two witnesses.

While Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. No. 14,693 (C. C., D. Va. 1807) at p. 159, that the English precedents were relevant in defining "levying war" under the Constitution, in *Ex Parte Bollman*, 4 Cranch 75, 8 U. S. 75 (1807), he indicated strongly that a strict interpretation of the Constitutional provision was called for by the American experience. He stated, at 4 Cranch 125-126, 8 U. S. 125-126:

> "As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.
>
> To prevent the possibility of those calamities which result from the extension of treason to offences of minor importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend."

and further at 126-127:

> "Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no

resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is therefore more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

The numerous Federal cases dealing with the treason of levying war [32] are of help in our problem only insofar as they treat the meaning of "overt act."

In the *Case of Fries*, 9 Fed. Cas. No. 5,126 (C. C., D. Pa., 1799), where the treason of levying war was involved, Judge Peters stated at p. 916:

"I think the overt act and the intention constitute the treason, for without the intention the treason is not complete."

And Justice Chase, in the second trial of the same case, stated at p. 932:

"If either of the three overt acts (or open deeds) stated in the indictment, is proved to your satisfaction, the Court are of opinion, that it is sufficient to maintain the indictment; for the Court are of opinion that every overt act is treasonable."

[32] *U. S.* v. *Vigol*, 2 Dall. 346 (C. C., D. Pa., 1795), *U. S.* v. *Mitchell*, 2 Dall. 348 (C. C., D. Pa., 1795), *Case of Fries*, 9 Fed. Cas. No. 5,126 (C. C., D. Pa., 1799), *U. S.* v. *Burr*, 25 Fed. Cas. Nos. 14,692a-k (inc.), *U. S.* v. *Cathcart*, 25 Fed. Cas. No. 14,756, (C. C. Ohio, 1864) *U. S.* v. *Greathouse, et al.*, 26 Fed. Cas. No. 15,254 (C. C., N. D. Calif., 1863), *U. S.* v. *Hoxie*, 26 Fed. Cas. No. 15,407 (C. C., D. Vt., 1808), *U. S.* v. *Hanway*, 26 Fed. Cas. No. 15,299 (C. C., E. D. Pa., 1851), *U. S.* v. *Greiner*, 26 Fed. Cas. No. 15,262 (D. C., E. D. Pa., 1861), *U. S.* v. *Rucker*, 27 Fed. Cas. No. 16,203 (C. C., W. D. Tenn., 1866).

Most instructive, however, is the comment of Chief Justice Marshall in charging the jury in *United States* v. *Burr*, 25 Fed. Cas. No. 14,693 (C. C., D. Va., 1807) where he stated, in part, as follows, at p. 172:

> "The whole treason laid in this indictment is the levying war in Blemmerhassett's Island; and the whole question to which the inquiry of the court is now directed is whether the prisoner was legally present at that fact. I say this is the whole question; because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged. *If is evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact.* The counsel for the prosecution have charged those engaged in defence with considering the overt act as treason, whereas it ought to be considered solely as the evidence of the treason; but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle: *that although the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction.* * * *" (Italics supplied).

This statement supports petitioner's contention that the overt act must be an act of treason. Chief Justice Marshall states that the crime of treason consists of the overt act,[33] and that although there may have been acts of treason other than those alleged in the indictment, the overt act alleged is the only act of treason on which a conviction can be based.

The first case of the treason of adhering to enemies arising under the United States Constitution was *United States*

[33] He states this definitely in *U. S.* v. *Burr*, 25 Fed. Cas. No. 14,692a at p. 13:

> "*This high crime consists of overt acts*, which must be proved by two witnesses, or by the confession of the party in open court." (Italics supplied).

v. *Pryor*, 27 Fed. Cas. No. 16,096 (C. C., D. Pa., 1814), which was considered in respondent's first brief at page 51, and in petitioner's reply brief at pages 6, 7. The Court there charged the jury that progressing from an English boat to the shore with the intention of procuring provisions for the use of the enemy was not an overt act of treason. The Court did, however, state that if the intent were to secure provisions for the enemy, by uniting with him in acts of hostility against the United States or its citizens, then progressing towards the shore would be an overt act of adhering to the enemy. There is no apparent reason why, with respect to the treason of adhering, the intent to unite with enemies in acts of hostility against the United States or its citizens should be thus decisive. It would, of course, be decisive if the indictment concerned the treason of levying war. In any event, as stated in our reply brief, the jury gave its verdict of not guilty without leaving the bar.

United States v. *Lee*, 26 Fed. Cas. No. 15,584 (C. C., D. C., 1814) was discussed in petitioner's first brief at page 34 and in respondent's first brief at page 51. The report states that the indictment charged the defendant with supplying the enemy with fruit and melons, showing them the channel of the river Potomac, and informing them of the situation of the troops of the United States. All these are acts of treason. Apparently, however, the evidence did not fully sustain the allegations. According to the defendant's counsel the evidence showed only a purchase of melons and an inquiry about the militia; according to government counsel the evidence showed a purchase of melons, and a collecting of information, and an attempt to carry these to the British. This conflict was not resolved by the Court, but the jury, "after retiring a few minutes," found the defendant not guilty.

The next case is *United States* v. *Hodges*, 26 Fed. Cas. No. 15,374 (C. C., D. Md., 1815). It appeared that some

persons of the town of Marlborough captured some British soldiers and made them prisoners. A general in the British army demanded that the prisoners be returned and threatened to burn the town and hold the women and children as hostages. The accused returned the prisoners to the British. On his plea that his intent was not traitorous, the jury found the defendant not guilty.

Chronologically this is the proper place to note Greenleaf's definition of overt acts of adhering found in his *Treatise on the Law of Evidence* (Boston, 1899), Vol. III, §244, p. 232:

> "The charge of treason by *adhering to the public enemies, giving them aid and comfort*, may be proved by evidence of any overt acts, stated in the indictment, done with that intent, and tending to that end: such as joining the enemy; liberating prisoners taken from him; holding a fortress against the State, in order to assist the enemy; furnishing him with provisions, intelligence, or munitions of war; destroying public stores in order to aid him; surrendering a fortress to him; or the like."

The next case[24] is *United States* v. *Werner*, 247 Fed. 708 (D. C., E. D. Pa., 1918), a hearing on defendant's demurrer to an indictment for the treason of adhering, alleging as an overt act the publication of a newspaper containing certain utterances. The question of law was whether printed words could constitute an overt act of treason. The Court refused to decide this question, holding that a decision could be made only after the evidence was in.

The next case is *United States* v. *Fricke*, 259 Fed. 673 (D. C., S. D. N. Y., 1919), which was discussed in petitioner's first brief at page 34 and in respondent's first brief at

[24] The treason of adhering was apparently alleged in the indictment in *U. S.* v. *Greathouse, et al.*, 26 Fed. Cas. No. 15,254 (C. C., N. D., Calif., 1863), but the court instructed the jury to disregard this allegation and to consider only the allegation of levying war.

pages 31, 50, 61 and 72. The official report merely reproduces the charge to the jury of Mayer, D. J. As defendant was acquitted and overt act 2, which charged the delivery of $6000 to an enemy spy, is clearly an act of treason, further discussion seems unnecessary. The case is relied upon by respondent simply because Judge Mayer made the observation that an overt act "in itself may be a perfectly innocent act standing by itself." That there was some divergence in view between Judge Mayer and Judge Learned Hand, whose opinion in the *Robinson* case we are about to discuss, may be conceded.

The next case is *United States* v. *Robinson*, 259 Fed. 685 (D. C., S. D. N. Y., 1919). This case was discussed in petitioner's first brief at page 31 and in respondent's first brief at pages 24, 50, 51 and 72. The question directly in issue in this case was the meaning of the two witness requirement. By way of *dictum*, however, Judge Learned Hand commented on the sufficiency of the overt acts alleged in the indictment, at page 690:

> "Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent. It is true that in prosecutions for conspiracy under our federal statute it is well settled that any step in performance of the conspiracy is enough, though it is innocent except for its relation to the agreement. I doubt very much whether that rule has any application to the case of treason, where the requirement affected the character of the pleading and proof, rather than recorded a season of repentance before the crime should be complete. Lord Reading in his charge in Casement's Case uses language which accords with my understanding:
>
> 'Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the

criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.

Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count and of those of the second count, which consist of acts that do not openly manifest any treason. Their traitorous character depends upon a covert design, and as such it is difficult for me to see how they can conform to the requirements."

The alleged overt acts of the first count concerning the sufficiency of which Judge Hand had grave doubt may be paraphrased as follows:

1. Sailing from Halifax with intent to convey to the German Government original messages before described with intent to obtain from those officials replies to be conveyed to certain named persons in furtherance of Germany's prosecution of the war.

2. Landing from a steamer in Rotterdam with intent to communicate to officials of the German Government the original messages and to receive from them the messages to be reconveyed by him to certain named persons.

The next case is *Stephan* v. *United States*, 133 F. (2d) 87 (C. C. A. 6th, 1943), 318 U. S. 781, 63 Sup. Ct. 858 (1943), 319 U. S. 783, 63 Sup. Ct. 1172 (1943). This case was discussed in petitioner's first brief at page 35 and in respondent's first brief at pages 53 and 61. As we pointed out before, proof of Stephan's guilt was overwhelming and several of the overt acts plainly sufficient. The record failed to present in any form the points now before this Court.

In *United States* v. *Leiner* (see Appendix to petitioner's first brief), the overt acts alleged in the indictment (1942) were substantially the same as those alleged in petitioner's indictment. The Court granted defendant's motion for a

directed verdict. The case is discussed in petitioner's first brief at page 32 and in respondent's first brief at page 66.

General Conclusions

We have tried to sketch a comprehensive background of precedent, English, and American, as a foundation upon which to build our argument relative to the specific questions at issue. To avoid confusion we now recapitulate our conclusions in general form:

The substance of our contentions is the same as before, that none of the overt acts submitted to the jury was legally sufficient, as none of them openly manifested treason; that the two witness rule would be meaningless verbiage if the basic act of treason could be proved by a single witness and two witnesses were required merely to substantiate some insignificant detail; that the false statements charged in overt act 10 in no event constitute a treason of adhering to enemies, giving them aid and comfort; and that the proofs were otherwise insufficient to comply with the two witness rule. We maintained these points upon the basis of the English cases decided before the American Constitutional Convention. We still maintain this same position, as will be apparent in the discussion which follows (*infra*, pp. 41 *et seq.*).

The scope of the questions now before the Court, however, is such as to touch practically every phase of the law of the treason of adhering to enemies. The task of following the lead of every precedent and the mass of historical data is endless. Since the Court directed reargument and new briefs, we have spent many months in the most careful research and study, in the light of the questions from the bench at the time of the first argument. Certain new points have thus developed which we have felt it was our duty to present, not only because they strengthen the contentions

already made but also because of the general importance of the cause and the circumstance that this is the first time a judgment of conviction for treason brings before this Court on the merits the whole problem of construing the constitutional definition of treason.

So that these new points may not serve to confuse the contentions already advanced, we now restate them.

(1) While we were at first disposed to believe that the English precedents of constructive treason were in a manner taken over and as it were made a part of the American treason of adhering to enemies, giving them aid and comfort, a more thorough study of the English cases, together with new early American material not previously known to us, makes it clear that the constitutional definition created an entirely new pattern, which was never intended to include mere attempts or abortive conspiracies. The petitioner is entitled to the benefit of this point and we now assert that each of the overt acts submitted to the jury is insufficient, for the additional reason that it is not charged nor did the proofs establish that petitioner in fact gave any aid and comfort to the enemy. We now urge the Court to hold that, as in the case of levying war, so in the case of adhering to enemies, mere preliminaries, such as attempts and conspiracies will not suffice.

There is ample justification for such a holding. The English law concerning overt acts of adhering was directly affected by the constant association of that species of treason with the treason of compassing the king's death. By freeing the treason of adhering from this association, the Constitutional Convention intended to rid the crime of those elements carried over from the treason of compassing the king's death, and to return to the original and patent meaning of the statute 25 Edward III in so far as that statute concerned the treason of adhering to enemies.

(2) Further clarifying the definition of an overt act one which must openly manifest treason, we say that overt act must be an act of treason, that is such an act when coupled with evidence of the accused's owing legiance to the United States, and his traitorous inte would justify submission of the case to the jury."

The Convention's conception of an overt act of adheri was probably best represented by the statute concernin treason passed by the Pennsylvania Assembly in 1777. this statute only an act of treason was an overt act adhering. An overt act of treason had been thus define by Blackstone, Hawkins, and Foster, with whose works th members of the Convention were well familiar,[35] and th was the definition of an overt act of treason given by Chi Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. N 14,693 (C. C., D. Va. 1807) at p. 172; and by Greenleaf i his *Treatise on the Law of Evidence* (Boston, 1899), Vol III, § 244, p. 232. So also, the charge of Lord Chief Justic Reading in the latest English case, *Rex* v. *Casement*, [1917 1 K. B. 98, 86 L. J. K. B. 467, is to the same effect. Lor Chief Justice Reading was then in 1917 expounding the statute 25 Edward III, and the Court in *United States* v. *Robinson*, 259 Fed. 685 (D. C., S. D. N. Y., 1919) and *United States* v. *Leiner* (Appendix to petitioner's first brief), fol lowed his lead in interpreting the Constitutional provision based on this statute.

[35] "The superior authority of adjudged cases will never be controverted But, those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected These books are in the hands of every student. Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitle to respect." Chief Justice Marshall in *U. S.* v. *Burr*, 25 Fed. Cas. No. 14,693, at p. 160.

II

The overt acts submitted to the jury were legally insufficient

Of the overt acts alleged in petitioner's indictment, overt acts numbered 1, 2, and 40 were submitted to the jury.

A

Overt acts 1 and 2, which are of similar substance and may be considered together, read as follows:

> "1. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did meet with Werner Thiel and Edward John Kerling, enemies of the United States, at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City and State of New York, and did confer, treat, and counsel with said Werner Thiel and Edward John Kerling for a period of time for the purpose of giving and with intent to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling.
>
> "2. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues, both in the City and State of New York, for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel."

Since there was no proof whatever offered by the Government concerning the subject matter of the conversation between petitioner and Thiel and Kerling, and Thiel alone, the overt acts must be treated as alleging simply that the

petitioner, on the occasions specified, met and talked with Thiel and Kerling, and Thiel alone.

These alleged overt acts are clearly insufficient. They are not acts of treason. They are not such acts as the proof of which, when accompanied with evidence of petitioner's allegiance to the United States and a traitorous intent would warrant submission of the case to the jury. In other words, meeting and talking with an enemy without more is not an act which on its face gives the enemy aid and comfort. As Chief Justice Marshall said, *supra*, p. 33, treason consists of overt acts; and the mere meeting and talking with an enemy is not treason. In this overt acts 1 and 2 are distinguished from those acts recognized to be sufficient overt acts of the treason of adhering to enemies, such as giving the enemy intelligence, sending them provisions, selling them arms, treacherously surrendering a fortress and the like.

While respondent contends and the Circuit Court in this case has held that an overt act in treason has no more significance than an overt act in conspiracy (R. 485), this contention finds not the slightest shred of support in any of the adjudicated cases nor in the ample discussion of the subject by textwriters of eminent authority. Nor has any reason been advanced to support a view at the same time so surprising and so much at odds with American tradition.

Overt acts 1 and 2 do not even satisfy the rule in *Lord Preston's* case, [1691] 12 How. St. Tr. 646. Meeting and talking with Thiel and Kerling, and Thiel alone is not alleged to be (which is conclusive), and the evidence does not show it to be, an act in conscious preparation for the doing of an alleged overt act which is an act of treason in the way that boarding the wherry in Middlesex was alleged in Lord Preston's indictment to be for the purpose of boarding a boat to take treasonable papers to France. Tested by any rule supported by precedent at the time of the American

Constitutional Convention, overt acts 1 and 2 are insufficient.

B

Overt act 10 reads as follows:

"10. Anthony Cramer, the defendant herein, on or about June 27, 1942, at the Southern District of New York and within the jurisdiction of this Court, did give false information and make false statements regarding Werner Thiel, an enemy of the United States, to officers and agents of the United States, to wit, John G. Willis and A. E. Ostholthoff, Special Agents of the Federal Bureau of Investigation, Department of Justice, then and there engaged for and on behalf of the United States in investigating said Werner Thiel and his activities in the United States, said false information and false statements being in substance as follows, to wit: (1) That Werner Thiel's name was 'Bill Thomas'; (2) That from March 1941 until June 1942, Werner Thiel had been working in a factory on the West Coast of the United States; (3) That during the aforesaid period, Werner Thiel had not been out of the United States; (4) That the money belt given him by Werner Thiel in June 1942, had contained only a couple of hundred dollars which Werner Thiel had owed him; (5) That $3,500 in his safe deposit box at the Corn Exchange Bank Trust Company, 86th Street Branch, belonged to him and to no one else, had been obtained by him from the sale of his securities, and was kept by him in a safe deposit box because he considered it safer there than in his savings account at said bank; the aforesaid false information and false statements being given and made for the purpose of concealing the identity and mission of said enemy, Werner Thiel, and for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel."

1

It is to be observed that there is no charge that these misstatements in fact gave aid and comfort to the enemy.

in any manner, shape or form, however indirect and remote. The allegation merely charges that the statements were made "for the purpose of giving and with intent to give aid and comfort." It is equally clear on the evidence that no aid and comfort was given nor was it possible to give any aid and comfort, as Thiel and Kerling as well were already, and had for some days previously been, in the custody of officers of the United States. If we are correct in our contention that the founders did not intend the constitutional definition of treason to include mere abortive attempts, this overt act 10 must fall.

2

Let us assume, however, that the view will prevail in this Court that, despite the change of pattern of the law of treason and despite the great difference in attitude toward the subject which is manifested by the host of circumstances hereinabove referred to, it was the intention of the founders to include in the definition of the treason of adhering to enemies, giving them aid and comfort, the various constructive extensions, which seem so utterly at variance with the plain wording of the constitutional definition and the American attitude toward treason as expressed by Chief Justice Marshall in *Ex Parte Bollman*, 4 Cranch 75, 125-127, 8 L. S. 75, 125-127, *supra*, p. p. 31-32. In other words, let us assume, for the purposes of argument, that a mere attempt to give aid and comfort to the enemy might suffice. Tested thus exclusively by the English precedents in force at the date of the Constitutional Convention, can it be said that petitioner's false statements as described in overt act 10 constituted an act of treason?

At the threshold of the discussion of this point we would have the court pause for a moment and consider a few undoubted historical facts. No one can doubt that, throughout the full course of the 16th, 17th and 18th centuries in England the methods of questioning and extorting informa-

tion from those in the custody of the law were rigorous, relentless and all too often barbarous and inhuman. Nor can there be doubt that, especially in cases of actual or suspected treason, the officers of the law bent every effort to obtain information of the identity and whereabouts of co-conspirators and participants in the all too numerous plots against the royal prerogative. Plainly, there must have been innumerable instances in which those subjected to such unremitting questioning made false statements relative to the identity and whereabouts of the others with whom the prisoner had planned and sought to consummate his treason. And yet, the most exhaustive research has failed to reveal a single English case in which the making of such false statements to officers of the law is alleged as an overt act of treason.

The English judges bent all their ingenuity in the direction of making the treason of adhering to enemies, giving them aid and comfort, flexible and then in stretching this flexible rule by construction to cover every conceivable instance to which they thought it might with any show of reason be extended. Just as Chief Justice Marshall solemnly announced that in America treason was not to be extended to doubtful cases but rather restricted and limited to the plain wording of the Constitution, so these English judges took the opposite view. Why is it then that no single English judge ever conceived the thought, so far as history reveals, that a man in custody under suspicion of treason might suffer the full penalties of the law by merely making a single false statement as to the identity and whereabouts of his confederates?

We think there were many reasons for this void. As a mere matter of humanity, it seems a shocking thing that the mere making of a false statement which leads to nothing should be the basis of a charge of treason. Were such a

view to prevail almost any statement might be twisted and construed into a treasonable utterance having a tendency to conceal the identity and whereabouts of a confederate or enemy agent. Were such a view to prevail the floodgates would indeed be down in time of war and no man caught in the toils of the law would be safe from a charge of treason.

The present case well illustrates this danger. There is no proof nor allegation that the false statements alleged to have been made by petitioner were then material to any interest of the Government in investigating Thiel or that the making of the statements gave, or could possibly give, any aid and comfort to the enemy. For all that appears, the statements may have been entirely irrelevant to any question concerning Thiel in which the Government was interested. For all that appears, Thiel was not only in custody but the Government was fully possessed of accurate and complete information of his movements and design prior to his arrest, including his activities in the United States before he returned to Germany. The assertion that these false statements had a tendency to give aid and comfort and that they were made by petitioner with the intent and purpose of giving aid and comfort to the enemy are mere empty conclusions.

It is significant that Congress had made it a distinct crime to do the acts which petitioner is alleged to have done in overt act 10. 50 U. S. C. § 33 provides as follows:

> "Seditious or disloyal acts or words in time of war. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the

United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both." [38]

3

Petitioner has thus far considered only those defects appearing on the face of overt act 10. When the evidence is considered other defects appear.

In England, prior to our Constitutional Convention, the acts of sending letters containing military information to the enemy, and cruising to take the king's ships, goods, and money, though the letters were intercepted and none of the king's ships taken, were held to be overt acts of the treason of adhering to enemies. One of the reasons given for such a ruling was that the accused had done all that he could do (see *supra*, p. 31). But petitioner did not do all that he could do. Petitioner was taken into custody by F. B. I. agents about 10:50 P. M. on June 27, 1942 (R. 69, 105) and was taken directly to the New York office of the F. B. I., arriving there at 11:20 P. M. (R. 105-106, 291). He was then questioned by F. B. I. agents and made the false statements constituting alleged overt act 10. However, during this same examination, and about an hour after

[38] In *U. S.* v. *Hoxie*, 26 Fed. Cas. No. 15,407 (C. C., D. Vt., 1808), defendant was indicted for the treason of levying war in that he and about sixty other armed men forcibly took a raft of timber from the possession of a Federal Collector. In its charge to the jury, the Court noted that [illegible]ss had made it a distinct crime to resist or oppose a customs offic[illegible] the execution of his duty, and then continued, at pp. 406, 401: "These laws of Congress have been mentioned, and others of a like nature might be referred to, to satisfy you, that the legislature never supposed an act of this kind treason, as they would only have declared its punishment; and, although if it be treason by the constitution, no act of Congress can make it otherwise; still, a legislative understanding of that instrument, if not conclusive, is entitled to a very respectful attention." The prisoner was acquitted.

he made his first false statement (R. 121-122), petitioner retracted all of his false statements and told the F. B. I. agents what he knew about Werner Thiel (R. 122-123, 154-155). Thus, before action was taken or could be taken on the basis of petitioner's false statements, petitioner retracted the statements and told the truth. He did not do all that he could do, and to call his very temporary and inconclusive attempt to lie to the F. B. I. an overt act of treason would be to extend the English precedents, themselves constructive extensions, making treason of an attempt to give the enemy aid and comfort. While depositing a letter addressed to enemy representatives and containing military information, in a Government letter-box was held in England to be an overt act of adhering to the enemy, *quaere* whether it would be a sufficient overt act to show that the accused walked toward the letter-box but destroyed the letter and deposited nothing.

The crime of perjury consists of testifying falsely to a material matter under oath and it is readily understandable that the crime should be deemed complete on the giving of false testimony without regard to subsequent retraction. But the wording of the crime of rendering the enemy aid and comfort on its face calls for actual aid and comfort to the enemy, and raises grave doubt to what extent an attempt to give the enemy aid and comfort can constitute the crime. Thus retraction has greater significance in treason than in perjury. Even in perjury, however, there is authority that there is no perjury if a false statement under oath is retracted in the same proceeding in which it is made. (See cases cited in *United States* v. *Norris*, 300 U. S. 564 (1937)), at pp. 575-576. While this Court did not follow this ruling in the *Norris* case, *supra*, where interpretation of §125 of the *Criminal Code* was involved, it there appeared that respondent's retraction occurred after

he had left the stand and the examination in which he had made the false statement had concluded. This Court noted, at p. 576, that a New York Court refused to follow the ruling noted above when the retraction was not a part of the same examination at which the false statement was made.

There is another point involving the extent to which an attempt to give the enemy aid and comfort can be treason. In overt act 10 it is alleged that petitioner made the false statements "for the purpose of concealing the identity and mission of said enemy, Werner Thiel." But Werner Thiel was arrested by F. B. I. agents on June 23, 1942 (R. 86), four days before petitioner made the false statements alleged in overt act 10. Since the Government thought it had enough information to justify arresting and holding Thiel, it is doubtful that anything Cramer said about Thiel could succeed in concealing his identity and mission which seems to have been already known to the Government. To hold that statements which could not possibly aid the enemy are overt acts of rendering the enemy aid and comfort would be an innovation in the law of treason. While Vaughan (*Rex* v. *Vaughan*, [1696] 13 How. St. Tr. 485) did not succeed in taking the king's ships when he went cruising for the French, there were the king's ships to be taken; and while Gregg (*Regina* v. *Gregg*, [1708] 14 How. St. Tr. 1371) and De La Motte (*Rex* v. *De La Motte*, [1781] 21 How. St. Tr. 687) did not succeed in getting their letters containing military information to France, there was a government in France to make use of the information contained therein. For petitioner, however, so far as appears in the allegations of the indictment or in the proof, there was no possibility in fact of concealing the identity and mission of Werner Thiel.

Moreover, with respect to overt act 10, there is the fact that petitioner's statements, which form the substance of that act, were made by him subsequent to the time he was taken into custody but prior to the time of his arraignment.

The statutes, 18 *U. S. C.* § 595 and 5 *U. S. C.* § 300a, giving petitioner the right to be taken immediately to a committing officer on his arrest are set forth in petitioner's first brief at pp. 39-40. The facts establishing that petitioner was not taken to a committing officer immediately on his arrest, and that his statements were made after his arrest and prior to arraignment are set forth in petitioner's first brief at pp. 36, 39.

If petitioner had been taken before a committing officer immediately on his arrest, he would have heard the justification for his detention and have learned of the seriousness of the charges which might be made against him. He would have been asked whether he had counsel to represent him. Actually none of this was done. It is clear that when petitioner was questioned he had no realization that any serious charge would be preferred against him, and his chief concern was about his right to retain the $200 which had been given to him by Thiel in repayment of an indebtedness (R. 134-135). He was, of course, not represented by counsel at the examination, and the arrest and examination came in such close sequence that he had no time to consider what steps he might or should take for his own protection. As the questioning of petitioner on the night of his arrest continued and he first got wind of the serious implications of his conduct, when F. B. I. Agent Ostholthoff said to him, "Cramer, you don't seem to realize in what a serious thing you have been involved" (R. 292), petitioner immediately retracted his false statements and told the truth.

Petitioner does not contend in the least that he is morally blameless for giving the false statements, but it does seem a grievous injustice that petitioner should have been arrested apparently on suspicion of treason, and while under illegal restraint caused to make statements, which later formed the very substance of the crime of which he was accused and found guilty. Surely statements thus obtained by illegal means cannot constitute an overt act of treason.

Petitioner contends, therefore, that overt acts 1, 2, and 10, as alleged and proved, are insufficient overt acts of the treason of adhering to enemies. Since these overt acts were the only ones submitted to the jury the indictment should be dismissed.

III

Overt acts 2 and 10 were not proved in accordance with the Constitutional provision that each overt act must be proved by the testimony of two witnesses.

A. *Overt Act 2.*

Overt act 2 consists of two meetings between petitioner and Thiel, one at the Twin Oaks Inn, the other at Thompson's Cafeteria. The facts supporting petitioner's contention that these two meetings were not testified to by the same two witnesses are fully set forth at pp. 3-9 of petitioner's reply brief on the first hearing of this case. As there pointed out, respondent erred in stating that Agent Fisher testified to the meeting between petitioner and Thiel at the Twin Oaks Inn. Agents Rice (R. 80-81), and Willis (R. 101-102), testified to the first part of overt act 2 and Agent Rice (R. 81) testified to the second part of this act. The only question is whether Agent Willis can be said to have proved the second part of the act. He testified that petitioner and Thiel went into Thompson's Cafeteria, stayed there awhile having refreshment, and came out (R. 102). He did not testify that they were together while

in Thompson's Cafeteria, and thus his testimony cannot be said to establish the second part of overt act 2, that petitioner "did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at * * * Thompson's Cafeteria * * *".

But, as pointed out in petitioner's reply brief at page 9, even if Agents Rice and Willis did testify to both parts of overt act 2, under the Court's charge the jury was permitted to find overt act 2 proved on the testimony of two different sets of witnesses, and, since Agent Stanley testified to the second part of overt act 2, could have found the act proved as to each of its parts by two different sets of witnesses.

The Constitution provides, Article III, Section 3, that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Petitioner contends that the requirement that two witnesses testify to the same overt act clearly means that two witnesses must testify to the whole overt act. If, where the overt act consists of two parts, two witnesses testify to each of the parts, but no two to the act as a whole, there cannot be said to be two witnesses to the overt act, which can mean nothing other than the overt act as alleged.

There is very little authority on this question either in this country or in England, probably for the reason that in most treason cases the overt act alleged is a single act. The question arises here only because of the unnecessary peculiarity of the pleading. If overt act 2 were a sufficient overt act, then either of its parts would be sufficient, and the Government could easily have avoided the question here raised if it had alleged the meeting at Twin Oaks Inn as one overt act and the meeting at Thompson's Cafeteria as another overt act. Sustaining petitioner's contention would not, therefore, make proof of an overt act more diffi-

cult but would only require more care in the alleging of the overt act.

It seems quite clear from the many cases already discussed that each overt act *as alleged* must be taken as a unit. The Government elects at its peril to plead several matters as a single overt act when it could, had it chosen to do so, have pleaded them separately.

There is reference to the point in question in the case of *Regina* v. *McCafferty*, [1867] 10 Cox C. C. 603, a case of the treason of levying war. The report is incomplete, and it is impossible to determine the precise facts to which the principle of law was addressed. Mr. Justice O'Hagan, one of the eight judges rendering opinions in the case, stated, at p. 608:

> "The evidence required by the statute to sustain a particular overt act is not necessarily the evidence of a single witness; the overt act may be, and generally is, a composite thing, passing through distinct stages, and made up of various circumstances; and to prove it in its integrity, several witnesses speaking to those different stages and circumstances may be necessary. If their joint evidence established the act to the satisfaction of the jury, the terms of the statute are satisfied."

It is possible that another one of the judges, Mr. Justice Fitzgerald, may have accepted this principle, but he does not base his opinion on it. The other six judges have nothing to say on this point of the case and base their decisions on entirely different grounds. The case, as a whole, seems too inconclusive to be held a precedent; and to this inconclusiveness must be added the fact that the case is an English one (and the witness rule is less strict in that country) decided in 1867, long after our Constitutional Convention.

In our country, the closest reference to this question of law seems to be found in *United States* v. *Fricke*, 259 Fed.

673 (D. C., S. D. N. Y., 1919), where Judge Mayer states at p. 677:

> "Where the overt act is single, continuous, and composite, made up of, or proved by, several circumstances, and passing through several stages, it is not necessary, in order to satisfy the provisions of the Constitution requiring two witnesses to an overt act, that there should be two witnesses to each circumstance at each stage, as distinguished from the necessary proof of two witnesses to an act other than continuous and composite.
>
> That means this: If one of the overt acts, we will say, was as in this case the sending of a telephone message, and you have the testimony of the telephone operator who received the message for transmission, and the testimony of the person to whom the message was transmitted, there are the stages of one transaction proved by two witnesses, as the one witness was at one end of the telephone and the other witness at another."

This statement has reference to an overt act that is a single act. Thus it does not apply to overt act 2 in petitioner's case which is not a single act but rather consists of two meetings, each different in time and place.

The authorities, therefore, do not help in the solution of the problem. Petitioner submits, however, that the interpretation clearly called for by the words of the Constitution, "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act" is that there must be two witnesses to the whole overt act.

B. *Overt Act 10.*

In overt act 10 (*supra*, p. 43) it is alleged that petitioner made certain false statements for the purpose of concealing the identity and mission of Thiel. The fifth false statement alleged is "That $3500 in his safe deposit box at the

Corn Exchange Bank Trust Company, 86th Street Branch, belonged to him and to no one else, had been obtained by him from the sale of his securities, *and was kept by him in a safe deposit box because he considered it safer there than in his savings account at said bank.*" Only one witness, Agent Willis (R. 108), testified to petitioner's making the statement set out in italics above.

The Circuit Court held that this part of overt act 10 could be regarded as mere surplusage, and further, that the jury could not conceivably have relied on it solely to establish the act, for it presupposed petitioner's claim of ownership which was proved by two witnesses. As petitioner argued in his first brief (p. 45), the part of overt act 10 in question does not presuppose petitioner's claim of ownership, and even if it did it is extremely doubtful that the claim of ownership of the $3500 would have been such proof that petitioner made false statements for the purpose of concealing Thiel's identity and mission as to warrant submission of the overt act to the jury. To the extent then that the jury might have relied on the part of overt act 10 in question to establish commission of the overt act, it was error for the Court to submit that part to the jury.

In its first brief, however, respondent argued that petitioner's own testimony could be availed of to establish the part of overt act 10 in question, that petitioner under the Constitution could be one of the two witnesses against himself.

In his reply brief petitioner contended that confession in open court was the only act by which the accused could determine his guilt, and that he could not be one of the required witnesses to the overt act. Petitioner, at pp. 10, 11 of his reply brief, quoted that part of the English statute 5 and 6 Edward VI having to do with the two witness rule. There the two witnesses were called "accusers"

and were required to be brought before the party accused. Petitioner pointed out that while the later English statute, 7 William III, used the word "witnesses" rather than "accusers", there is no indication that this statute changed the rule with respect to the identity of the witnesses required. Indeed East indicates that the words "accusers" and "witnesses" have the same meaning in the English statutory law of treason.[37]

The case bearing most directly on this point is *United States* v. *Magtibay*, 2 Philippine Island Reports 703 (1903). The Philippine law of treason, so far as it concerns proof of the overt act, is substantially the same as the Constitutional provision, and is found in Section 9 of the Act of Congress of March 8, 1902.

In this case it appears that the evidence against the accused, apart from his own testimony, was an admission to an inspector that he had given arms to a General Montalon, who was in armed rebellion against the Government, and that there was found on his person a commission from Montalon. The first question was whether this admission could be given in proof of the overt act. The Court held that it could not. The Court then went on to consider the effect of the accused's own testimony at the trial. On this point the report reads as follows, at p. 705:

> "The defendant testified as a witness in his own behalf at the trial. He denied that he had deserted, but claimed that he had been carried off by forces of soldiers of Montalon and taken to the latter's camp

[37] "The stat. 5 & 6 Ed. 6 c. 11, s. 12, enacts, 'That no person shall be indicted, arraigned, condemned, convicted, or attainted for any treasons that then were or after shall be, unless thereof accused by two lawful accusers (i. e., witnesses), which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the accused to prove him guilty of the treasons or offences contained in the indictment, unless the said party arraigned shall willingly without violence confess the same.'" East, *supra*, Ch. II, Sec. 63, p. 137

He promised to serve them, and they made him a lieutenant and gave him a revolver. He remained with them two weeks, but he says that it was against his will and that he had no opportunity to escape, except the time when he was captured. This is not a confession within the meaning of the said section 9. The confession there mentioned means a confession of guilt. The section cannot be extended so as to include admissions of fact made by him in giving his testimony after a plea of not guilty, from which admissions his guilt can be inferred. The evidence required by the act of Congress does not appear in this case."

While it does not appear clearly whether the point of the accused being one of the witnesses was raised, the Court does state that "The evidence required by the act of Congress does not appear in this case." If this point was not raised this is itself persuasive of its inefficacy.

The first point in the *Magtibay* case, *supra*, also appears by way of dictum in *United States* v. *Greiner*, 26 Fed. Cas. No. 15,262 (D. C., E. D. Pa., 1861). This is a report of proceedings before a District Judge for the commitment of the accused on a charge of treason. In his opinion on a motion to commit, the presiding judge stated, at p. 40:

"The evidence for the prosecution has consisted of the direct testimony of one witness to the alleged overt act, and of admissions made voluntarily by the accused party since his arrest. The Constitution provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The admissions here proved were not such confessions, and, upon the trial of an indictment, would not, in connection with the testimony of a single witness to the overt act suffice to warrant a conviction. * * *"

The judge went on to hold, however, that the Constitutional provisions concerning proof of the overt act were in-

applicable in proceedings before grand juries or in preliminary investigations such as were being held in that case.

It seems to be established, then, that it is not sufficient proof of the overt act that one witness testify to the act and another to an admission of the accused to the doing of the act. Unless the accused in taking the stand forfeits the protection afforded by the Constitutional provision concerning the requirement of two witnesses, then it follows logically that the accused cannot be one of the two witnesses to the overt act. Otherwise the accused, in being questioned on the basis of an admission, could be made to repeat the admission on the stand; and thus effect would be given to the admission otherwise inadmissible as proof of the overt act.

Petitioner submits that it is evident from the history of the two witness rule in treason, and from such authority as there is, that the accused cannot be one of his own "accusers."

Conclusion

Petitioner has in this brief discussed only those points as to which this Court asked for additional briefs in its order of May 22, 1944. Petitioner does not intend to waive any of the points previously raised.

The Judgment Appealed from Should be Reversed and the Indictment Dismissed or, in the Alternative, a New Trial Ordered.

Dated: New York, September 29, 1944.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 13

ANTHONY CRAMER,

Petitioner,

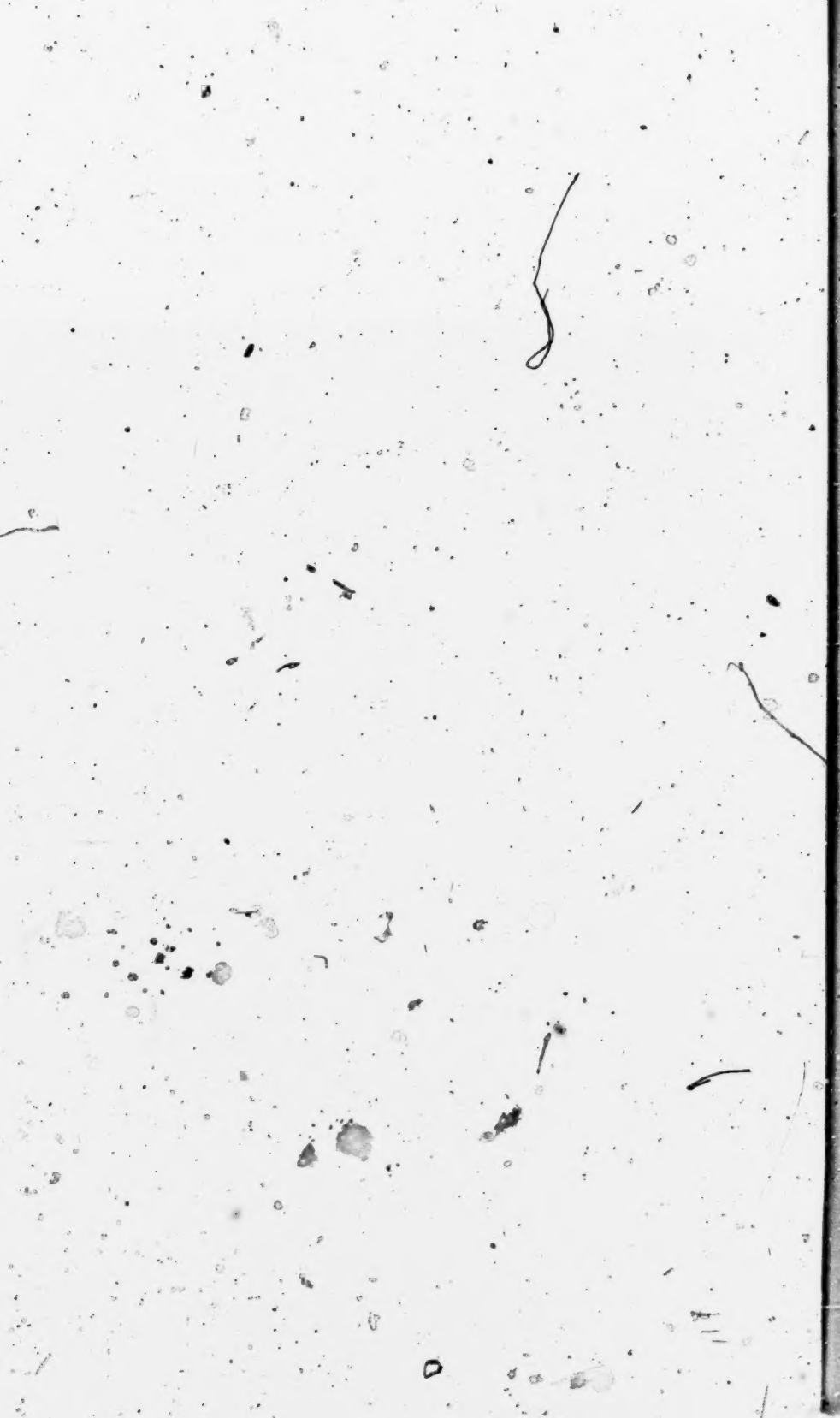
vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

HAROLD R. MEDINA,
Counsel for Petitioner;
JOHN MCKIM MINTON, JR.,
RICHARD T. DAVIS,
Of Counsel.



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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

I

A Review of the Respective Contentions of Petitioner and Respondent Concerning the Overt Act Requirement in the Treason of Adhering to Enemies.

Respondent's brief, and the Appendix thereto, are built around the erroneous thesis that it is petitioner's contention that proof of the overt act in treason must comprehend and establish the entire crime, that overt act and intent is a single element in the crime.

Petitioner has never so argued. Petitioner took pains to make this clear in the briefs submitted on this first argu-

ment of this case (see Pet. 1st reply brief, pp. 1-2), and in the brief submitted on this reargument (esg. Pet. 2nd brief, pp. 3, 5).

In the briefs submitted by petitioner to the court on the first argument of this case, petitioner contended that the overt act in treason must openly manifest treason. In this statement petitioner adopted the language of Judge Learned Hand in *United States* v. *Robinson*, 259 Fed. 685 (D. C., S. D. N. Y., 1919) who in turn had relied in part on Lord Chief Justice Reading's charge in *Rex* v. *Casement* [1917], 1 K. B. 98. It was apparent to petitioner, however, that Judge Hand and Lord Chief Justice Reading could not have meant, in their belief that the overt act in treason must "manifest a criminal intention," that proof of the overt act must of itself incontrovertibly establish the entire crime of treason. It is difficult to conceive any act which in itself completely demonstrates treasonable intent. There would usually be the question whether the accused knew the identity, as enemies, of the persons with whom he is alleged to have had treasonable dealings. Furthermore, evidence of the mere doing of any act fails to preclude the possibility that the act was done with a motive not treasonable. While providing the enemy with munitions of war or secret military information would be as clear an overt act of the treason of adhering to enemies as could be hoped for, the doing of these things in itself does not exclude, for example, the possibility of duress. Thus Hodges, in *United States* v. *Hodges* (see Pet. 2nd brief, pp. 34-35) was acquitted on his testimony that his returning enemy prisoners to the enemy was done to prevent the burning of the town and the destruction of its women and children. Accordingly, petitioner concluded that such eminent authorities as Judge Hand and Lord Chief Justice Reading must have meant that the overt act must "manifest treason" in the

sense that it must of itself give color and credence to the existence of the treasonable design (Pet. 1st reply brief, p. 2). This interpretation is consonant with the statement of Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. No. 14,693, p. 169 (see Pet. 1st brief, p. 34 fn.), with respect to the treason of levying war:

> "Before leaving the opinion of the Supreme Court entirely, on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion which the means bear to the end? Why is it that a single armed individual entering a boat, and sailing down the Ohio for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war?"

The additional research made possible by the Court's order for further argument enabled petitioner further to clarify this concept of overt acts. Clearly the treason of adhering to enemies, giving them aid and comfort, required something more than intention. Even if there were no overt act requirement with respect to this treason, some act would be required since "giving them aid and comfort" is a substantial element in the crime, and according to the authorities is explanatory of "adhering to their enemies" (see Pet. 2nd brief, p. 8).

In explaining what types of acts constitute the aid and comfort required, authorities such as Hawkins and Foster list such acts as furnishing the enemy with money, arms, ammunition, surrendering the king's castle, cruising in enemy ships, etc. (see Pet. 2nd brief, pp. 8, 9fn.). From this point it was logical to turn to examples of sufficient *overt acts* of the treason of adhering to enemies, giving them aid and comfort, to see if any distinction was drawn

between the act of aid and comfort required to establish the treason and the *overt act* of that treason required by the statute 25 Edward III and the Constitution of the United States. Petitioner found no distinction. Indeed the same acts which the authorities give as examples of the aid and comfort required are again given as examples of sufficient overt acts of the treason of adhering to enemies, giving them aid and comfort (see Pet. 2nd brief, pp. 14, 35).

This then was the clue to an understanding of the overt act requirement in the treason of adhering to enemies, giving them aid and comfort. The overt act must be an act sufficient to establish the crime in so far as the crime consists of an act. Such an act would, of course, lend color and credence to the existence of a treasonable design. In this sense the act cannot be divorced from intent. For the more the overt act on its face coincides with the definition of the act that is the treason, the more probable it is that the act was done with traitorous intent, since the apparent implications of the conduct become clearer as the act more evidently approaches the constitutional proscription (see Appendix to respondent's brief, p. 366).

No authority has been cited to disprove that such is the meaning of overt acts with respect to the treason of adhering to enemies, giving them aid and comfort. On the other hand, there is substantial authority to support it. As for English authority, the statute 25 Edward III states that the accused must be provably attained of his adhering to the enemy, giving them aid and comfort, by open deed. The proof of the act of aid and comfort lies in the overt act. Foster, East, and Lord Chief Justice Treby in *Rex* v. *Vaughan* [1696], 13 How. St. Tr. 485, 498, state that the overt act is the means used to accomplish the treason (see Pet. 2nd brief, pp. 13, 14, 20), and it is stated in Black-

stone's *Commentaries* (see Pet. 2nd brief, p. 14) and in Halsbury's, *The Laws of England* (see Pet. 2nd brief, p. 14), that the treason of adhering to the enemy, giving them aid and comfort must be proved by the overt acts. In every English case of the treason of adhering decided prior to our Constitutional Convention, except *Lord Preston's* case [1691], 12 How. St. Tr. 646, which has its own explanation (see Pet. 2nd brief, pp. 15 *et seq.*), the overt acts relied on are such as would establish the crime, given a traitorous intent.

To these authorities previously cited by petitioner may be added Hallam, who states that the overt acts alleged against the accused in treason must be such as "from which an inference of his guilt is immediately deducible" (see Appendix to respondent's brief, pp. 116, 116 fn., 117 fn.), and it is stated, in what is apparently the latest treatise on English criminal law (Harris and Wilshere's *Criminal Law*, 17th ed., London and Reading, 1943):

> "Every assistance given by the king's subjects to his enemies, unless under apprehension of immediate death in case of refusal, is an overt act of treason in this sense, e. g. to become naturalised in an enemy country in time of war; to raise forces for the king's enemies; to send them arms, money, or intelligence; or to join them in acts of hostility. An overt act of adherence must be proved, but the mere conspiracy to adhere might be an overt act of compassing the king's death . . . . . " (pp. 101-102, footnotes omitted).

As for American authority, the fact that the overt act was understood to be the act of treason, the act of giving aid and comfort, is made clear by the Pennsylvania Statute of 1777 and its counterparts in Connecticut, North Carolina and Vermont (see Pet. 2nd brief, pp. 24-28, Appendix to respondent's brief, p. 234), which required unequivocally that two witnesses prove the specific act which constituted the treason. Judge Peters in the *Case of Fries* (see Pet.

2nd brief, p. 32) states that treason consists of overt act and intention and in *United States* v. *Burr* (see Pet. 2nd brief, p. 33) Chief Justice Marshall states of the overt act in treason: "It is evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact."

From such authority petitioner has concluded that to be sufficient an overt act of the treason of adhering to enemies, giving them aid and comfort, must be such an act as, when coupled with evidence of the accused's owing allegiance to the United States, and a traitorous intent, would warrant the submission of the case to the jury. To justify submission to the jury of a case of the treason of adhering to enemies, giving them aid and comfort, there must, of course, be proof that the accused did an act which gave aid and comfort to an enemy. The overt act must be such an act; it must be an act which on its face gives the enemy aid and comfort.

If mere conspiracies and abortive attempts to give aid and comfort are held to be treason in the United States the definition of the overt act requirement must be phrased somewhat differently. While petitioner contends that the English cases holding attempts to be sufficient are not precedent in this country due to the dependence of this rule on the treason of compassing and imagining the death of the king and the omission of any such treason in our Constitution, nevertheless, if petitioner's contention is rejected, the overt act must at least be an act which if successfully carried out would give aid and comfort to the enemy in the sense of the only cases on the subject prior to the American Constitutional Convention, namely, that sending letters containing secret military information to the enemy is treason even though the letters are intercepted. If these cases are held to be precedent it is of the utmost importance to recognize the limits of that precedent.

By depositing in a Government letter-box a letter addressed to enemy agents and containing secret military information, the accused unequivocally lends color to the charge of treason. The act is complete on his part; he did all that he could. The act did not have the intended effect. But this was not for the reason that something yet remained to be done by the accused, nor for the reason that the accused later did an act which nullified the effect of the act of depositing the letter, nor for the reason that the enemy could not receive aid from the secret military information. The reason was simply that the letters were intercepted before reaching the enemy.

Petitioner's definition of overt acts in treason is clearly supported by the authorities. Such a definition precludes the sufficiency of innocent and insignificant acts which can somehow be related, by one witness, to the decisive and condemning act of aid and comfort itself established by one witness.

The reaction of respondent to our hypothetical case of the man who, with intent to reveal information of military matters to an enemy agent, arises, has his breakfast, walks to the house in question, rings the door-bell and finally, but under the observation of but a single witness, makes the disclosure to the enemy, goes to the heart of this phase of the case. Under the test proposed by respondent at the time of the first argument any one of the innocuous preliminaries would constitute a sufficient overt act, as each is "a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, giving them aid and comfort, and must be related to, and in furtherance of, the accomplishment of the treasonable purpose" (Res. 1st brief, p. 23). But these innocent acts, at least as to the arising and the eating of breakfast, are now stated to be plainly insufficient. It is stated "Such acts would be insignificant in the treasonable scheme—in-

adequately related to it in terms of purpose and effectuation" (Res. 2nd brief, p. 65).[1] Apparently respondent has some lingering doubts about walking down the street and ringing the door-bell. It is stated that the fact that the accused "tied his shoelace" would of course not suffice (Res. 2nd brief, p. 65), although in the first brief respondent asserted that "raising one's hand" would meet the test (Rec. 1st brief, p. 34). In the same spirit respondent seems quite satisfied with the ruling in the *Pryor* case that going in the boat from the British vessel of war to the shore for provisions for the enemy would not be a sufficient overt act because not "sufficiently translated into the realm of action to satisfy the requirement of an overt act" (Res. 2nd brief, p. 62) but suggests that carrying provisions in the direction of the enemy "would be very different".

The test originally propounded is accordingly completely abandoned. But what does respondent substitute in its place? Nothing whatever, unless it be the vague suggestion that the act in order to be sufficient must be "adequately related to the act of adhering in terms of purpose and effectuation". This means nothing. Nor is clarification to be found in the distinction apparently made between eating breakfast on the one hand and walking down the street on the other. When analyzed this is found to be mere verbiage, not the formulation of any legal test or principle. Driven from one unsound position to an-

[1] The source of respondent's difficulties is probably explained in the following statement of the author of one of the appendices to its brief (Appendix, p. 366):

> "Of course, even though it be held proper in theory that the 'overt act' be simply some step in execution of the intent, and not such as necessarily evidences the intent, one might emerge with the practical result of requiring the latter, if he insisted that the act be very far along in execution. For the closer the act is to accomplishment, the more likely that it will in fact be some evidence of intent."

other respondent's contention resolves itself into mere empty words.

As opposed to this petitioner presents a wholly clear, workable principle which is open to no abuse or "construction" and which is amply supported by the most weighty precedents.

Respondent indicates (Res. 2nd Brief, p. 66) that the purpose of the overt act in the case of the treason of adhering is to prevent punishment merely for thought or intentions. But this cannot be true. Even if there were no overt act requirement with respect to the treason of adhering, no one could be convicted of this treason for mere thought or intention. The crime requires an act in any event, an act which gives aid and comfort to the enemy.

The purpose of the overt act and the allied two-witness requirement must then of necessity have greater significance. It is more than a bulwark against conviction for thought and intention. It is an assurance that no one shall be convicted of the greatest of all crimes unless the vital and decisive act, the act that constitutes the treason, is testified to by two witnesses. To assign to the overt act and the two-witness requirement any less function is to disregard completely all that is evidentiary of the importance of these concepts: the survival of the statutory overt act requirement for almost 600 years and its inclusion in the Constitution of the United States and in the constitutions of most of its component states; the provision of the statute 7 William III expressly excluding evidence of overt acts not alleged in the indictment; the voluminous discussion of these concepts by writers of treatises on the law of treason, and the extent to which their treatment of the law is centered on discussion of proper overt acts; the survival of the statutory two-witness requirement for almost 400 years, and the probability that the requirement existed at common law; the inclusion of the two-witness

requirement in the Constitution of the United States and in the constitutions of most of its component states, and the inclusion therein of a more rigid provision than the one prevailing in England, more rigid in the sense that it afforded greater protection to one accused of treason.

In its discussion of the English material respondent cites no authority which disproves that the overt act in the treason of adhering must be an act of treason. In its first brief, and on the first argument of this case, respondent relied most heavily on *Lord Preston's* case [1691], 12 How. St. Tr. 646. Respondent no longer relies on this case.

Indeed, respondent in its brief does not discuss or rely on any English case of the treason of adhering to enemies, whether decided before or after the American Constitutional Convention. While petitioner contends that these English cases are not relevant in interpreting the Constitutional definition of treason, for the reason that the omission of the treason of compassing made the Constitutional definition more restrictive, the English cases would, if anything, state the law in a sense the least favorable to petitioner. But, as far as the relationship of the overt act to the treason of adhering is concerned, petitioner has found that in every English case of the treason of adhering, with the exception of *Lord Preston's* case [1691], 12 How. St. Tr. 646, which has its own explanation based on requirements of venue (see Pet. 2nd brief, pp. 15-17), the overt acts relied on were such as proof of which, when coupled with evidence of the accused's owing allegiance to England, and evidence of a traitorous intent, would under the English law of the meaning of the treason of adhering warrant the jury in finding the accused guilty of treason (see Pet. 2nd brief, pp. 15-24).

Respondent now relies on the English law of overt acts as it concerns the English treason of compassing and imagining the death of the king. Respondent reviews the textual authority in England down to 1800. While respondent is troubled by the use of such words as "a signifier," "manifest," and the like, in describing the relationship of overt acts to the crime of treason, respondent concludes that a fair reading of the treatises as a whole supports its conclusion that overt act and treasonable intent are separate elements in the crime of treason. This petitioner concedes to the extent indicated (see *supra*, pp. 2-3, 4).

The only English case on which respondent relies is *Crohagan's* case, Cro. Car. 333, 79 Eng. Rep. 891 (see Res. 2nd brief, pp. 24-26), which is a case involving the treason of compassing and imagining the death of the king. Crohagan, an Irish Dominican priest, while on shipboard at Lisbon, spoke the words "I will kill the king if I may come to him." He later entered England and was tried and found guilty of the treason of compassing and imagining the death of the king. It is clear from the reports that the words were alleged as an overt act. While it is certain that it was alleged somewhere in Crohagan's indictment that he came into England for the purpose of killing the king, it is not certain that this act was alleged as an overt act of compassing and imagining the death of the king. Although Foster seems to imply that it was (see Res. 2nd brief, p. 25), Kelyng stated that speaking the words was the only overt act (see Appendix to Res. 2nd brief, p. 94). Hale states only that the act of coming into England for the purpose of killing the king "was somewhat of a overt-act" (see Res. 2nd brief, p. 24), and the report of the case mentions only that the speaking of

the words was testified to by two witnesses, stating further that "and for that his traiterous intent and the imagination of the heart is declared by these words, it was held high treason by the course of the common law, and within the express words of the statute of 25 Edw. 3, c. 2."

Crohagan's case interested the treatise writers only for its relevance to the question of whether words could constitute an overt act of the treason of compassing and imagining the death of the king. The authors of treatises on the law of treason opposed the idea that mere words could be an overt act of the treason of compassing, and their emphasis on the allegation that Crohagan came into England for the purpose of killing the king is evidently an attempt to bring the case within the realm of their principle that mere words would not suffice. In fact, however, it appears that Crohagan was convicted on the alleged overt act of his threat to kill the king. And on this point the case must be taken to have been overruled by subsequent decisions (see Appendix to Res. 2nd brief, p. 164).

Considering the usual statement of the treatise writers in discussing the treason of compassing that the overt act must "manifest" the treason (see Appendix to Res. 2nd brief, pp. 64-69, 76-77, 107), and the general statements to the same effect in cases of this treason (see Pet. 1st brief, pp. 25-27); there is nothing in this material to contradict petitioner's assertion that the overt act must be an act of treason.

There is grave danger, however, in using overt acts of compassing and imagining the death of the king as authority for the meaning of such acts in the treason of adhering to enemies, giving them aid and comfort, particularly in relying on specific overt acts alleged in cases of compassing.

The treason of compassing and imagining the death of the king was constructively extended to make it treason to compass and imagine other matters than the death of the king. Thus as the author of one of the appendices submitted by respondent states (Appendix, pp. 163-164, footnotes omitted):

> "The effect of this expansive application of the compassing branch, resulting in the creation of numerous constructive treasons, was to give the charge of compassing a significance beyond that of factual proof of the proscribed state of mind. As an analytical matter, if given conduct were held as matter of law to prove an intent that it did not prove as a matter of fact, it was really immaterial whether the defendant had entertained that intent. Thus, when conspiracy to imprison the king was held as matter of law to fall within the compassing branch, the real issue would not be whether the defendant had actually compassed or imagined the death of the king, but whether he had engaged in a conspiracy and had entertained the intent to imprison the king. If he had not so engaged, or had not so intended, he would not be guilty of the crime of compassing.
>
> "In this way a treason which was defined and originally regarded as consisting simply and actually of a particular state of mind was expanded to make treason of conduct carried on with a different state of mind."

Thus, since the meaning of the treason of compassing and imagining the death of the king was always in flux and indefinite, the meaning of an overt act of that treason, necessarily related to the meaning of the treason itself, must likewise be indefinite.

There is another significant consideration. The treason of compassing and imagining the death of the king makes treason of mere thought alone. The treason of adhering to the enemy, giving them aid and comfort, makes treason

of an act. While an overt act is required to "manifest" the compassing, what will demonstrate thought and intention is much more uncertain than the act which will demonstrate an act of giving the enemy aid and comfort. Thus as the author of one of the appendices to respondent's second brief states (appendix p. 166):

> "The branch of the statute defining adherence perhaps did not provide as pliant materials for fashioning constructive treasons. Unlike the treason of compassing, and like the treason of levying war, the treason of adherence seems defined primarily in terms of conduct. The statute did not stop with the words 'be adherent to the enemies of our Lord the King,' but went on to add 'giving to them aid and support * * *.' The statute appears therefore to deny an opportunity to seize on conduct and declare it to constitute the treason of adherence on the ground that it shows as a matter of fact or law a mental state of attachment to the enemy. On its face, it would seem, more obviously than the compassing provision, to require some quite definite translation of thought into action, as a requisite to the commission of the treason of adherence."

Moreover, respondent concedes, in discussing the leading English text-writers on treason, that "their primary concentration on treason by compassing inevitably tends to weaken their value as guides to the construction of a constitutional provision from which that branch of treason is omitted" (see Res. 2nd brief, p. 22). The refusal of American Courts to accept any doctrine having to do with the English treason of compassing as precedent in treason cases arising under the Constitution (see *infra*, pp. 27-28), reinforces this conviction.

An overt act of the treason of adhering to enemies, giving them aid and comfort, is, however, analogous to an overt act of the treason of levying war. Both treasons

call for an act rather than an imagination; both are included in the Constitutional definition of the crime. The quotation from East at pages 8 and 9 of petitioner's second brief shows how closely the two treasons are allied, and the propriety of this analogy, and this analogy alone, is recognized in one of the appendices to respondent's second brief (Appendix, p. 168).

There has never been a suggestion that the overt act in levying war can be anything less than an act which if done with traitorous intent would constitute levying war. A conspiracy to levy war does not constitute the treason of levying war either under the statute 25 Edward III or the Constitution of the United States (see Res. 2nd brief, p. 58). Since conspiracy to levy war is not the treason of levying war it is also an insufficient overt act of that treason (see Appendix to Res. 2nd brief, pp. 100, 320, 367). Respondent attempts to explain this by the statement that "The overt act must, it is true, advance the intent so far in execution that it can be said that war is being actually levied" (Res. 2nd brief, p. 60). To this petitioner repeats the observation of the author of one of the appendices to respondent's brief (Appendix, p. 366):

> "Of course, even though it be held proper in theory that the 'overt act' be simply some step in execution of the intent, and not such as necessarily evidences the intent, one might emerge with the practical result of requiring the latter, if he insisted that the act be very far along in execution. For the closer the act is to accomplishment, the more likely that it will in fact be some evidence of intent."

As respondent concedes with respect to the treason of levying war, so with treason of adhering to enemies, giving them aid and comfort—the overt act must advance the intent so far in execution that it can be said that aid and comfort is being actually given to the enemy.

The author of one of the appendices to respondent's brief states (Appendix, p. 166) of the treason of adhering to enemies, giving them aid and comfort:

> "On its face, it would seem, more obviously than the compassing provision, to require some quite definite translation of thought into action, as a requisite to the commission of the treason of adherence."

If anything in the law of treason is certain, it is the fact that only an act which constitutes levying war is a sufficient overt act of the treason of levying war. Indeed in *Regina* v. *Purchase*, [1710] 15 How. St. Tr. 651, it was held in England that no overt act as such need be specified in an indictment for the treason of levying war, since the statement of the facts constituting the levying war (see *supra*, p. 16), namely, that in such cases the overt p. 13fn.).[2] Coke was in accord (see Res. 2nd brief, p. 29fn.).

As for our treason of levying war, Chief Justice Marshall in *United States* v. *Burr*, (25 Fed. Cas. No. 14,692a), at page 13, states that "This high crime consists of overt acts . . ." (see Pet. 2nd brief, p. 33fn.), and Judge Peters in *Case of Fries*, (9 Fed. Cas. No. 5,126), states at p. 916, that the overt act and intention constitute this treason (see Pet. 2nd brief, p. 32).

Of course the most relevant discussion of the meaning of overt acts in the treason of adhering to enemies, giving them aid and comfort, is found in the cases of that particular treason. *Rex* v. *Vaughan*, [1696] 13 How. St. Tr. 485, is the only English case prior to the American Constitutional Convention in which this treason is found freed of association with the treason of compassing and imagining the death of the king. There Lord Chief Justice

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[2] The holding is noted only in *Regina* v. *Dammaree*, 15 How. St. Tr. 521, 546. See Appendix to respondent's brief, p. 145 fn.

Treby makes the following statement concerning overt acts of adhering to the enemy, giving them aid and comfort (p. 498):

> "And the overt act or acts, in this case, ought to be the particular actions, means, or manner by which the aid and comfort was given."

In other words, the overt act must be the act of treason.

Lord Chief Justice Treby's original doubt that an overt act was required with respect to the treason of adhering to enemies, giving them aid and comfort (see Res. 2nd brief, p. 21 fn.), springs not from any problem of interpreting the statute 25 Edward III, which most clearly required an overt act in this treason, but from the same logic that prompted the Court in *Regina* v. *Purchase*, [1710] 15 How. St. Tr. 651, to hold that no overt act as such was required in the case of the treason of levying war (see *supra*, p. 21), namely, that in such cases the overt act as such is superfluous since the indictment must charge the means by which war was levied and aid and comfort given, and this is the overt act. Lord Chief Justice Treby's conviction that an overt act was required with respect to the treason of compassing and imagining the death of the king, stems from the fact that this treason, alone of all the treasons, does not call for an act.

It is abundantly clear that in England, up to the time of the American Constitutional Convention, and indeed to the present time, the meaning of an overt act of the treason of adhering to enemies giving them aid and comfort, has been that the overt act must be the act of treason, the means by which the aid and comfort is given, the act that when shown to have been done with traitorous intent would warrant the jury in finding the accused guilty of this treason.

As for the meaning of overt acts of the treason of adhering to enemies, giving them aid and comfort, in the American states prior to the Constitutional Convention, petitioner in his second brief at pages 25-27, sets forth the Pennsylvania Statute of 1777 with respect to treason. As conclusive evidence of the meaning of an overt act, petitioner pointed out that under the Pennsylvania statute, two witnesses are required to testify to the very act that is specified in the statute to be treason.[3]

Statutes similar to the Pennsylvania statute were passed during this period in Connecticut, North Carolina, and Vermont (see *Appendix* to respondent's brief, p. 234). The fact that the nine remaining original states passed statutes containing, as concerns the treason of adhering, the general phraseology of the statute 25 Edward III, (see Appendix to respondent's brief, p. 234) is not important. Petitioner would contend that the meaning of the overt act of the treason of adhering under these statutes was that the overt act must be an act of treason. What is significant is that in those states where it was found desirable to change the phraseology of the crime of the treason of adhering to the enemy, giving them aid and comfort, a change was made in a particular which caused it to be beyond dispute that the act to which two witnesses must testify is the act which constitutes the act of treason.

Respondent's discussion of treason under the Constitution deals exclusively with petitioner's contention that the Constitutional definition established an entirely new pat-

[3] Respondent states (2nd brief, p. 44 fn.) that under petitioner's view of this statute a conspiracy to adhere to the enemy must be taken as constituting treason by adherence. But the Pennsylvania statute says "or shall form or be any way concerned in forming any combination, plot or conspiracy *for betraying this state or the United States of America into the hands or power of any foreign enemy.*" This clearly called for more than the usual aid and comfort to the enemy, and undoubtedly contemplated treason in high places.

term of the law of treason—a proposition which petitioner will consider presently—and with the proposition that the overt act and intent are distinct elements in the law of treason, a theory which petitioner concedes to the extent indicated (see *supra*, pp. 2-3, 4).

For support of his proposition that in cases under the American Constitution the overt act must be an act of treason, an act which if done with traitorous intent would constitute treason, petitioner relies on the opinion of Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. No. 14,693, that the overt act "is evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact". (see Pet. 2nd brief, p. 33), the statement of Judge Peters in *Case of Fries*, 9 Fed. Cas. No. 5, 126, that "the overt act and the intention" constitute treason (see Pet. 2nd Brief, p. 32), and the statement of Judge Learned Hand in *United States* v. *Robinson*, 259 Fed. 685, that the overt act must openly manifest treason (see Pet. 2nd brief, pp. 36-37).

While respondent readily concedes that a restrictive approach to treason is a marked characteristic of the law of treason under the United States Constitution (see Res. 2nd brief, pp. 56-57) it states that the required approach is satisfied by a strict rule of proof in the establishment of intent. While clear proof of the specific intent is undoubtedly required, logically there is no reason for a stricter rule concerning proof of the specific intent in treason than in other crimes requiring specific intent. The unique feature of the law of treason in the United States is not the requirement of specific intent, but the requirement that there must be two witnesses to the same overt act of the crime. In this sense the American law of treason is doubly restrictive since the Constitutional provision concerning proof of the overt act is more restrictive than the

English provision which was itself restrictive of conviction of the crime.

Of course the two-witness rule loses all significance if the act to which the two witnesses must testify is "any act", or some insignificant act which can somehow be related, by one witness, to the decisive and condemning act of aid and comfort which is itself established by the testimony of but one witness.

II

Attempts to Give the Enemy Aid and Comfort Are Not Treason under the Constitution

Prior to the American Constitutional Convention it was implicitly or directly held in England, that carrying letters (*Lord Preston's* case [1691], 12 How. St. Tr. 646, or sending letters (*Regina* v. *Gregg* [1708], 14 How. St. Tr. 1371; *Rex* v. *Hensey* [1758], 19 How. St. Tr. 1341, *Rex* v. *De La Motte* [1781], 21 How. St. Tr. 687, *Rex* v. *Fyrie*, [1782], 21 How. St. Tr. 815) to the enemy containing secret military information was treason even though the letters were intercepted. Only in these particular cases of sending such information was an unsuccessful attempt held to be treason. Although *Rex* v. *Vaughan* [1691], 13 How. St. Tr. 485, is sometimes cited as support for the proposition that an attempt to give aid and comfort can be treason, it seems clear that in that case aid and comfort to the enemy was actually given (see Pet. 2nd brief, pp. 18-19). In view of the special reason given for the sufficiency of an attempt in cases of sending such letters to the enemy by Lord Chief Justice the Earl of Clonwell in *Rex* v. *Jackson* [1794] 25 How. St. Tr. 783, 871 (see Pet. 2nd brief, p. 11 fn.), it may be doubted whether it was generally understood that

attempts to give aid and comfort would be treason in any case.

But be that as it may, it is clear that the doctrine that carrying or sending letters to the enemy containing secret military information would be treason, even though the letters were intercepted, developed from the joining in one indictment the treason of compassing and imagining the death of the king, and the treason of adhering to the king's enemies, giving them aid and comfort.

With respect to the treason of compassing the king's death it was not necessary that the attempt to aid the enemy should be successful. All that was required in the treason of compassing was some act to evidence the accused's state of mind, some act to show that he was imagining the king's death, or in fact, just imagining some lesser evils such as deposing the king, taking possession of his person, attempting to remove his counsellors, compelling him by force to yield to certain demands, which, if anything were done about them, would have the possible effect of injuring the king (see East, *Pleas of the Crown*, Vol. I, Ch. II, § 7, also *supra*, p. 13). An attempt to aid the king's enemies was as sufficient a manifestation of such imagining as the actual giving of aid to the enemy. The treason of adhering, however, on the face of its definition in the statute 25 Edward III called for actual aid and comfort to the enemy.

In every English case before the American Constitutional Convention in which an unsuccessful attempt to give aid and comfort was recognized to be treason, the treason of adhering was joined with the treason of compassing. Since the attempt to give aid and comfort was clearly a sufficient overt act of compassing, it was of little importance, in any case where the treasons of compassing and adhering were joined, to make a distinction in the case of the treason of

adhering since the accused would be guilty of treason in any event and would under the compassing count suffer the maximum penality: death, and not a merciful one.[3a] The prime consideration given to the more familiar and more pliable treason of compassing in cases where that treason is joined with the treason of adhering, so permeates the law of the treason of adhering as recognized in the cases, as to prompt the author of one of the appendices to respondent's brief to express real doubt whether *Lord Preston's* case, in which the two are joined, could be used as an authority

[3a] The unimportance of drawing the distinction is strikingly indicated by Foster's refusal to state forthrightly that sending letters to the enemy containing secret military information was an overt act of adhering, and his preference to explain cases so holding on the theory of the treason of compassing:

> "The cases cited * * * did not in truth turn singly upon the rule here laid down, though I think the rule may very well be supported. For *Gregg* was indicted for *compassing the death* of the Queen, and also for *adhering to her* enemies; and *Hensey's* indictment was in the same form, and so was Lord *Preston's* * * *; and the writing and sending the letters of intelligence, which, in the cases of *Gregg* and *Hensey, were stopped at the post-office*, was laid as an overt act of both the species of treason: so that admitting for argument's sake, which is by no means admitted, that it was not an overt act of *adhering*, since the letters never came to the enemy's hands and consequently no *aid* or *comfort* was actually given, yet the bare writing and sending them to the post-office, in order to be delivered to the enemy, was undoubtedly an overt act of the other species of treason. In *Gregg's* case the judges did resolve, that it was an overt act of both the species of treason charged on him; and in *Hensey's* the court adopted that opinion and cited it with approbation." (see Appendix to respondent's brief, pp. 99-100)

It can at least be said that to Foster's mind the statement that such an act was an overt act of adhering would be a matter requiring some argument which he did not see fit to make in view of the undoubted fact that the act would be a sufficient overt act of the treason of compassing.

In *Rex* v. *Cooke*, [1696] 13 How. St. Tr. 311, Lord Chief Justice Treby showed the same reticence to hold that a conspiracy to give aid and comfort was a sufficient overt act of the treason of adhering and indicated the unimportance of so deciding since such a conspiracy was so certainly

for any point involving the treason of adhering under the United States Constitution (*see Appendix*, p. 140).

Whether an attempt to give aid and comfort to any enemy would be held in England at the present time to be the treason of adhering under the statute 25 Edward III is far from clear. Archbold states that a conspiracy to adhere does not constitute that treason in England (see Appendix to respondent's brief, pp. 111-112) and the latest treatise on English criminal law is in accord (see *supra*, p. 5).

Respondent concedes that "there is no easy answer to the question how far English doctrines of the law of treason were intended to be incorporated into our constitutional definition" (Res. 2nd brief, pp. 14-15).

There is early evidence in America that the desire of this country was to take over the treason of adhering to the enemy, giving them aid and comfort, without the affecta-

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a sufficient overt act of the treason of compassing and imagining the death of the king:

> "there are laid in the indictment two sorts of treason: the one is compassing and imagining the death of the king, the other is adhering to the king's enemies. The evidence to prove these treasons seems to be joint; for, as to that of compassing and imagining the king's death, as well as to the other, the overt acts are meeting and consulting about the treason; and then agreeing and resolving to invite and procure an invasion from France, and to meet that invasion with an insurrection here. And the evidence is applied equally to prove these acts.
>
> Gentlemen, that these are proper overt acts of compassing the king's death, I need not inform you, the law is very well known; and the prisoner's own counsel do acknowledge, that these are sufficient overt acts of compassing and imagining the king's death: so that all which they defend him by is, the improbability of the testimony given against him." (see Appendix to respondent's brief, p. 141)

The failure of Lord Chief Justice Holt in *Rex* v. *Freind*, [1696] 13 How. St. Tr. 1, and in *Rex* v. *Parkins*, [1696] 13 How. St. Tr. 63 to submit the treason of adhering to the jury where that treason was coupled in the indictment with the treason of compassing (see Pet. 2nd brief, p. 20) is indication of the overwhelming attention focused on the treason of compassing in such cases.

tions which association with the treason of compassing had imposed upon it. It will be remembered that in England, the only attempt recognized to constitute the treason of adhering was the sending of letters containing secret military information which were intercepted. Thus in the Pennsylvania Statute of 1777, and in its counterparts in Connecticut, North Carolina, and Vermont, an attempt to convey intelligence to the enemies of the State or the United States is made misprision of treason, not treason. Under the Pennsylvania statute the Courts went so far as to hold that the provision "persuading others to enlist" in the army of the enemy (see Pet. 2nd brief p. 25) meant successful persuasion and that the accused was not guilty if the one whom he tried to prevail upon to enlist in the British Army refused to enlist. *Respublica* v. *Roberts*, 1 Dall. 39.

The Constitution of the United States omits any treason comparable to the English treason of compassing, and rejects as well any of the subsidiary treasons that developed under that treason, for example, conspiracy to levy war.

The author of one of the appendices to respondent's second brief concludes (Appendix, pp. 278-279):

> "The omission from the constitutional clause of any provision analogous to that in English law which punished compassing the death of the king removed the foundation on which the English judges had built much of the reprobated structure of 'constructive' treasons. It is a fair inference, in view of the vigor with which the restrictive policy of the Constitution emerges from the evidence, that it would violate that policy to import into our law English doctrine based on the omitted clause of the Statute of Edward III: Even so there were in English history ingenious constructions under those clauses of the Statute which the Constitution did adopt, and if the full gloss is to

be taken with the clauses, the limiting value attributed to the use of the familiar words might be considerably depreciated. The problem is made the more difficult because in England indictments often contained counts under both the charges of compassing the king's death and levying war against him, or adhering to his enemies; and broad rulings of the courts did not draw distinctions as to the relative scope of these different charges. All that can be said is that, so far as the contemporary materials are concerned, their weight is clearly in favor of resolving doubts on the side of precise definition of the offense. Obviously this is the point of Wilson's law lectures."

Another author in the appendices states (Appendix, pp. 371-372):

"Most of the excesses of the English law of treason, prior to the 18th century, can be described in terms of a treasonable intent found by inference under the head of compassing the death of the king: men were convicted not on evidence fairly showing that they had planned the king's death and the overthrow of the government, but on the basis of expression or advocacy of ideas or measures whose 'natural' consequences, as deduced by their political foes, might involve harm to the king or the state. The overwhelming evidence is that the treason clause of the United States Constitution was intended to limit the scope of that offense; and, as we have seen, that is the admonition of policy on which the courts of this country have centered ever since. As the treason clause is the product not of theory, but of history, the practical meaning of its restrictive policy should be drawn from history. The most obvious manner in which the Constitution narrows the scope of treason is by omitting any analogue of the crime of compassing the king's death. Since most of the reprobated doctrines of the English law had developed under that head, it makes historical sense to look there for the kinds of doctrine which the framers wished to bar from the American law of 'treason'.

> There is of course some truth in the observation that the crime of compassing had no ready analogy in a republic; but to treat this as more than a minor factor would be to substitute bloodless logic for living policy."

The omission in the Constitution of any type of treason comparable to that of compassing the death of the king is thus of tremendous consequence. The treason of adhering to enemies, giving them aid and comfort, disassociated from the treason of compassing, was freed of those constructive extensions explainable solely by its being overwhelmed in treason trials by this more virulent treason.

The draft of the Constitutional provision concerning treason submitted by the Committee of Detail to the Constitutional Convention defined the treason simply as "adhering to the enemies of the United States, or any of them," omitting the phrase "giving them aid and comfort." (see Appendix to Res. 2nd brief, pp. 255-256). The Committee of the Whole, in inserting the words "giving them aid and comfort," thus directed its attention specifically to these words, and added them with an intent to restrict the crime (see Appendix to Res. 2nd brief, pp. 260, 281fn.). While the members of the Committee spoke only generally of restricting the offense, could it not be that by adding words on their face calling for actual aid and comfort they meant just that, that only actual aid and comfort should be treason? Assuming that their intent was to restrict the crime, their purpose could not have been merely to conform the Constitutional provision to the language of the statute 25 Edward III, since that language had already been constructively extended to include a certain type of attempt to commit the crime.

When the occasion arose for this Court to interpret the levying war provision of the treason clause of the Consti-

tution in *Ex Parte Bollman*, 4 *Cranch* 75, 8 U. S. 75, Chief Justice Marshall not only made the general observation "that the crime of treason should not be extended by construction to doubtful cases" (see Pet. 2nd brief, pp. 31-32), but also determined that under the Constitution the treason of levying war means what it says and requires an actual levying of war (*Ex Parte Bollman*, p. 126):

> "To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

That the treason of levying war should have been so restricted was not a foregone conclusion. In England conspiracy to levy war was treason. Since it was thought to be clearly the treason of compassing and imagining the death of the king, there was no need to extend the treason of levying war to cover it. Since the treason of compassing was not included in our Constitutional definition, the treason of levying war might have been extended to cover such a conspiracy as was certainly treason in England. But the treason of levying war was not so extended; the omission of such a treason as compassing the death of the king was decisive.

In the early judicial opinions concerning treason under the Constitution, it was clearly indicated that there should be great caution in the use of English authorities to interpret the Constitutional definition. While this was sometimes exemplified by a refusal to accept any guidance from

English authorities, the general result was a refusal to accept English doctrine developed under charges of compassing and imagining the death of the king (Appendix to respondent's brief, pp. 301 *et seq.*).

The doctrine that an attempt to give the enemy aid and comfort constituted the giving of aid and comfort is a doctrine that developed under the charge of compassing and imagining the death of the king.

The author of one of the appendices to respondent's brief reports, as to cases of treason in the United States (Appendix, pp. 307-308):

> "Nevertheless, though the reported decisions in treason trials are not numerous, when they are examined with a view to checking the practical reality of the restrictive policy, the preponderance of acquittals and of specific rules laid down with careful regard to the protection of the accused indicates that the restrictive policy has expressed an operative attitude and not merely a pious hope."

Under the Constitutional provision that "Treason against the United States, shall consist only in levying war against them, or in adhering to their Enemies, giving them Aid and Comfort," the treason of adhering is committed only by giving actual aid and comfort.

In conclusion petitioner desires to make brief comment on the Appendix to respondent's brief which contains very helpful material upon which petitioner has drawn freely in the preparation of this brief. Of course petitioner cannot, in the time allotted for the filing of this brief consider in detail the material contained in this Appendix and the conclusions drawn therefrom. The basic criticism petitioner has of the Appendix is the unreality of the distinctions there attempted to be set forth. On the crucial question of the meaning of an overt act of treason the distinction sought

be drawn is between acts "evidencing a treasonable intent," and acts "translating the intent into the world of action by some thing done towards its execution" (see Appendix, p. 65). That this in fact presents no workable distinction for practical purposes is shown by the respondent's brief, which adopts the distinction formulated in the Appendix, and by the Appen ix itself. Respondent rejects the sufficiency of some of the suggested overt acts in petitioner's hypothetical case (see Pet. 2nd brief, p. 3) on the ground that they would be inadequately related to the treasonable scheme in terms of purpose and effectuation (Res. 2nd brief, p. 23). Respondent accepts the ruling in the *Prior* case that going in a boat from a British vessel of war to the shore for provisions for the enemy was not a sufficient overt act. Respondent accepts the ruling on the ground that treason was not "sufficiently translated into the realm of action to satisfy the requirement of an overt act" (Res. 2nd brief, p. 62). Respondent explains the fact that conspiracy to levy war is not a sufficient overt act of levying war on the ground that "The overt act must, it is true, advance the intent so far in execution that it can be said that war is being actually levied" (Res. 2nd brief, p. 60). It becomes thus apparent that the test is satisfied, not by any act which "advances the intent in execution" but by an act which advances the intent in execution to some uncertain and vague extent. Since "one might emerge with the practical result of requiring the latter [that the overt act evidence intent], if he insisted that the act be very far along in execution" (Appendix to Res. brief, p. 366), respondent either ends up with the view for which petitioner contends, or with a proposition so nebulous and inconclusive as to be of absolutely no value in determining the sufficiency of overt acts of treason.

Conclusion

The Judgment Appealed from Should Be Reversed, and the Indictment Dismissed or, in the Alternative, a New Trial Ordered.

Dated: New York, N. Y., November 10th, 1944.

Respectfully submitted,

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No. 406

In the Supreme Court of the United States

OCTOBER TERM, 1943

ANTHONY CRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 475–488) is reported at 137 F. (2d) 888.

JURISDICTION

The judgment of the circuit court of appeals was entered on September 7, 1943 (R. 489). The petition for a writ of certiorari was filed on September 30, 1943, and was granted on November 8, 1943 (R. 489). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of

the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether overt acts 1, 2, and 10 as alleged in the indictment and proved by the evidence were legally sufficient to sustain a charge of treason.

2. Whether, with respect to overt acts 2 and 10, there was failure to comply with the "two witnesses" rule in that, as petitioner contends:

(a) No two witnesses each testified to the whole of either of such acts; and

(b) The proof in support of overt act 10 consisted of testimony as to statements made by petitioner to officers of the Government during the period between his arrest and his arraignment.[1]

3. Whether the district court committed reversible error:

(a) In admitting in evidence a copy of the Constitution of the United States on which the petitioner had marked the section defining treason;

(b) In allowing, on cross-examination of the petitioner, a question as to whether he had received a letter from his nephew warning him that his letters were so unfriendly to the United

[1] By this contention, made for the first time in petitioner's brief in this Court, petitioner seeks to invoke the doctrine of *McNabb v. United States*, 318 U. S. 332.

States that he was in danger of being put on a blacklist;

(c) In permitting the introduction of what petitioner characterizes as "an excessive amount of evidence" to substantiate the enemy character of the persons to whom petitioner was charged with having given aid and comfort.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution, Art. III, sec. 3:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

18 U. S. C. 1, 2 (R. S., §§ 5331, 5332; Act of Mar. 4, 1909; c. 321, §§ 1, 2, 35 Stat. 1088):

> 1. Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.
>
> 2. Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five

years and fined not less than $10,000, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States.

STATEMENT

Petitioner was indicted, in the District Court of the United States for the Southern District of New York, for treason. The indictment alleged ten overt acts, only three of which (overt acts 1, 2, and 10) were submitted to the jury (R. 351, 437). Petitioner was found guilty by the jury (R. 448) and was sentenced to 45 years' imprisonment and to pay a fine of $10,000 (R. 453). Upon appeal to the Circuit Court of Appeals for the Second Circuit, his conviction was unanimously affirmed (R. 489).

The case presents another phase of activities part of which were before this Court in *Ex parte Quirin*, 317 U. S. 1. The petitioner here is charged with having given aid and comfort, with treasonous intent, to Werner Thiel and Edward Kerling, two of the eight saboteurs. In the first alleged overt act it is charged that he "did meet with * * *, and did confer, treat and counsel with" Thiel and Kerling, on June 23, 1942, at the Twin Oaks Inn at Lexington Avenue and 44th

Street in New York City, for the purpose and with the intent of giving them aid and comfort. (R. 437–438). In the second it is charged that on the same date, with the same intent and purpose, he "did accompany, confer, treat, and counsel with" Thiel alone, at the Twin Oaks Inn and also at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues in New York City (R. 438). As the evidence set forth below shows, petitioner was with Thiel for over three hours on the evening of June 23, 1942, at the Twin Oaks Inn and later at Thompson's Cafeteria, and Kerling joined them for a part of the time at the former place. Overt act 1 has reference to the time that Kerling was with them at the Twin Oaks Inn, and overt act 2 to their conference alone at the same place after Kerling left, and to their further conference at Thompson's Cafeteria. In the third overt act submitted to the jury (overt act 10) it is charged that on June 27, 1942, petitioner gave five false statements to Special Agents Willis and Ostholthoff, of the Federal Bureau of Investigation, regarding Thiel, for the purpose of concealing the latter's identity and mission (R. 438).[2]

The evidence adduced at the trial is well summarized in the opinion of the court below (R. 475), and the petitioner in his brief here (p. 4) has

[2] The content of these statements is set forth (*infra*, pp. 19–20) in our discussion of the evidence.

chosen to accept that summary as sufficient for purposes of his statement of the case. However, we believe that this Court's consideration of the case may be aided by a somewhat more detailed statement of the evidence, with appropriate references to the Record.[3]

Petitioner was born in 1900 in Ollendorf in Westphalia, Germany (R. 218–219). He served for a short time in the German Army in the last days of the first World War (R. 220–221). In 1925 he came to this country with the avowed intention of remaining here permanently and becoming a citizen (R. 223). His passage was paid by a German farmer in Iowa for whom he worked for two years (R. 222, 224–225). He removed in the fall of 1927 to Chicago, where he was employed for a while by a contractor and by a dredging company (R. 225). There, in 1928, he made formal declaration of intent to become a citizen (R. 225–226). From Chicago he removed to South Bend, Indiana, where he worked for the Studebaker Corporation (R. 227), and from there he removed to Detroit, where he worked as a die fitter for several different automobile companies (R. 227–229). There, in 1929, he met Thiel, who had come to this country in 1927 from a place in Germany not far from petitioner's birthplace (R. 229, 236–237). The two became close friends, and were together a great deal of the time during

[3] The facts as stated above are substantially undisputed (Pet. Br., p. 4).

the next twelve years. When the depression curtailed employment in Detroit, petitioner went to New York, where he secured work as a painter's helper and at various odd jobs (R. 228). Thiel followed him to New York nine or ten months later (R. 237–238). In July 1933, petitioner went to Hammond, Indiana, where he was employed for nearly three years as a fireman and mechanic at St. Margaret's Hospital (R. 229–230). Thiel joined him there at the invitation of petitioner, who lent him the money with which to come (R. 239–240). There they saw each other nearly every day (R. 240), and in 1934 both joined the Friends of New Germany, predecessor of the German-American Bund (R. 240).[1] Petitioner was secretary or treasurer of the Hammond unit (R. 298), but resigned from the organization in 1935 (R. 142, 241). In his statements to Federal Bureau of Investigation agents he said that he had resigned because of his dislike of the organization's military emphasis and trappings and radical activities (R. 142–143, 241); at the trial he testified that he was also actuated by a swindle that had occurred (R. 241, 297–298). Thiel remained in the organization (R. 241). He was described by petitioner in his testimony as a man who would "get irritated when he was opposed in his subject, in his particular views, particularly about national

[1] Thiel had become interested in this organization somewhat earlier, in 1932 or 1933 in New York (R. 238–239).

ideas", who from the early 1930's had favored "the national socialist doctrine", and who had stated, in one of their conversations in 1932 or 1933, "that a couple of hundred thousand men could easily be sacrificed for the expansion or glory of a nation" (R. 239). At some time later Thiel left Hammond for employment on the Pacific coast (R. 241).

Petitioner, in June 1936, visited Germany (R. 230, 242). He remained there until the following September, witnessed the Olympic games at Berlin, and saw various members of the German-American Bund whom he had met in this country (R. 132, 243, 299–300). On November 9, 1936, after his return, he received his final citizenship papers at Hammond (R. 29, 242). That winter he and Thiel joined one Thielmann in an unsuccessful delicatessen venture in Florida (R. 230–232). In May 1937, petitioner returned to New York, where he was joined by Thiel, and the two lived either together or in close proximity for nearly four years (R. 232–235, 245, 250–251.)[5] In March 1941, Thiel left for Germany, stating that he felt war was imminent between the United States and Germany and that his prospects were better in Germany (R. 251–253). Petitioner ad-

[5] During this period in New York petitioner held various positions (R. 232–235). For the two years preceding his arrest on June 27, 1942, he was employed by the National Licorice Company as a stationary engineer (R. 234–235).

mitted that he knew Thiel to be a thorough-going Nazi at the time he left for Germany (R. 251–252).

Petitioner corresponded with Thiel in Germany (R. 328–329). His pre-Pearl Harbor letters were sympathetic with the German cause and critical of American opposition to that cause.* That he retained the same attitude after Pearl Harbor appears from a letter (Gov. Ex. 63, R. 114, 116–117, 336–338, 343–344) written in April, 1942, to Thiehmann, with whom he and Thiel had been associated in the delicatessen business in Florida, in which he said, referring to the possibility of being drafted: "Personally

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* On November 25, 1941, he wrote Thiel (Gov. Ex. 68, R. 117–118, 331–334) saying that he had declined a $100 a week job at Detroit "as I don't want to dirty my fingers with war material;" that "not vocabularies, but defiance, boldness, will and sharp weapons will decide the war, and the German Army and the German people are not lacking in these;" that "We sit here in pitiable comfort, when we should be in the battle—as Nietzsche says—I want the man, I want the woman, the one fit for war, the other fit for bearing;" and that he would have to be circumspect in discussing political developments in America "since this letter will probably go twice through enemy censorship." He testified on direct examination (R. 257) that by the last statement he had meant British and German censorship, but had difficulty in explaining, on cross-examination (R. 332–333), why he would have applied the term "enemy" to Germany in a letter to Thiel, or why he would have expected a German censor to take exception to his comments. On December 3, 1941, he wrote his relatives in Germany, saying (Gov. Ex. 69, R. 117–118, 315, 334–336): "Personally I am still well and spending my days really much too pleasantly, in view of the gigantic sacrifices which the glorious disciplined German Army is making from day to day for the Homeland."

I should not care at all to be misused by the American army as a world conqueror."[7] On cross-examination petitioner admitted that he had listened to German short-wave broadcasts and knew that the theme of German propaganda was that England and the United States were fighting a war of aggression and seeking to conquer the world (R. 354).

Petitioner next saw Thiel on the evening of June 22, 1942.[8] The circumstances which led to the meeting, as he described them, were unusual. That morning a strange voice called his name from the hall of the rooming house where he lived, and on his failure to respond an unsigned note, in an unknown handwriting, was slipped under his door reading: "Be at the Grand Central Station tonight at 8 o'clock, the upper platform near the information booth, Franz from Chicago has come into town

[7] In setting forth these excerpts from petitioner's letters written before and after Pearl Harbor, we do not intend to suggest that any of them exceeded the limits of his right of freedom of thought and speech. We set them forth for the same purpose for which they were introduced in evidence, namely, as evidence indicative of a motive for the acts later committed and as bearing on his state of mind.

[8] In the meantime, Thiel had entered the German army and, in April 1942, with seven other German soldiers who likewise had lived in the United States, had volunteered for a special mission to destroy the American aluminum industry (R. 30–31). They were taught the use of incendiaries and explosives and supplied with eight boxes of explosives (R. 40), some of which were made to look like pen and pencil sets and others like lumps of coal (Gov. Exs. 11–27, R. 33–35).

and wants to see you; don't fail to be there" (R. 261–262). Petitioner testified that he knew no "Franz from Chicago" (R. 262). Nonetheless he was there at the appointed hour, and ten minutes later Thiel appeared (R. 262, 301).[9] After a brief conversation they walked to the Twin Oaks Inn, where they talked from 8:25 P. M. until 10:30 P. M. (R. 263). Petitioner made no inquiry as to why Thiel had taken such a mysterious method of getting in touch with him (R. 302); but one of the first things he said to Thiel was "Say, how have you come over, have you come by submarine?" (R. 263). Thiel looked startled, smiled,[10] and said "Some other time I am going to tell you all about this." He cautioned peti-

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The eight saboteurs were brought to this country in two groups, by German submarines. One group, consisting of Edward Kerling, as leader, and Thiel, Haupt, and Neubauer, was landed by rubber boat on June 17 at Ponte Vedra Beach near Jacksonville, Florida (R. 42, 44, 48, 63, 64–66, 170, 171). After the explosives were buried according to instructions, Kerling and Thiel proceeded to New York, where on June 21 they registered at the Hotel Commodore under the assumed names of Edward Kelly and William Thomas (R. 170–172; Gov. Exs. 52, 53, R. 66). The other group had landed at Amagansett, Long Island, on June 13, and likewise proceeded to New York (R. 42).

[9] Thiel thus sought out petitioner on the first day following his arrival in New York on June 21 (see footnote 8, *supra*).

[10] Special Agent Willis testified that when interviewed by Federal Bureau of Investigation agents petitioner had stated that "he had a hunch that is the way he [Thiel] came over," and that "that hunch was substantiated in his mind when he saw Thiel smile" (R. 133).

tioner: "Remember now my name is Bill Thomas and I am anti-Nazi—I am anti-Nazi" (R. 263).[11] He also showed petitioner a draft card bearing the name of "William Thomas" (R. 266). Thiel indicated that he had come from the coast of Florida (R. 142), and petitioner inquired if he had used a rubber boat (R. 134, 148). Petitioner inquired about the bombing of Germany and Thiel said "you know the only time I really was scared to death was when I came over here we got bombed," to which petitioner replied "Then you have come over by submarine, haven't you?" (R. 267). Thiel told petitioner also that Thiel's oldest brother was "quite an influential member of the [Nazi] party;" that he (Thiel) had "three and a half or four thousand dollars" with him; and that "if you have the right kind of connection you can even get dollars in Germany" (R. 265, 268). Petitioner offered to keep Thiel's money for him in petitioner's safe deposit box (R. 269). Thiel, after hesitating, said: "O. K. You can do that"; but nothing was done about it that evening. While at the Twin Oaks Inn Thiel cautioned petitioner against talking too loudly, since they seemed "to arouse much

[11] Petitioner admitted on cross-examination that he had doubted Thiel's statement that he had become anti-Nazi (R. 345), and also that he doubted Thiel's further statement that he had taken the first opportunity to get out of Germany because of conditions there (R. 349). Petitioner in fact testified that he knew at the time that Thiel was a member of the Nazi party (R. 301).

attention around here" (R. 265). From the Twin Oaks they went to the Commodore Hotel bar for a short while. They parted at about 11:00 P. M. Thiel rejected petitioner's suggestion that they meet next time at his room "because I have too many acquaintances there and I don't want them to see me" (R. 269); so they agreed to meet again at the Twin Oaks at 8:00 P. M. the following evening, June 23 (R. 143, 269).

On cross-examination concerning the June 22 meeting petitioner at first testified that when he first met Thiel he had a "hunch" that Thiel was here on a mission for the German government (R. 338). He then denied this, stating that his "hunch" was merely that Thiel had come by submarine (R. 344, 345). He testified further, however, that he had asked Thiel "whether he had come over here to spread rumors and incite unrest,"[12] and then admitted that he therefore must have suspected that Thiel was on a mission for the German Government (R. 349–350). Petitioner's realization of Thiel's purpose is shown likewise by his statements, when interviewed by Federal Bureau of Investigation agents, that he had suspected that Thiel had received the money from the German Government (R. 135–136), that Thiel in fact had told him that he was on a mis-

[12] When interviewed by Federal Bureau of Investigation agents he admitted that he had believed this to be Thiel's purpose (R. 133, 155).

sion for the German Government (R. 154), and that "whatever his mission was, I thought that he was serious in his undertaking" (R. 142).

On the evening of June 23 petitioner and Thiel met again at the Twin Oaks at the appointed hour (R. 270). Thiel said that he was expecting Kerling, and that Kerling had come over with him (R. 271). Petitioner had met Kerling in this country, and knew that he had returned to Germany two years before (R. 138). Kerling was the "leader" of the group with which Thiel had landed on the coast of Florida (R. 40). Federal Bureau of Investigation agents were already on Kerling's trail. Special Agents MacInnes and Willis, who were following him, both testified that they saw him enter the Twin Oaks at about 8:20 P. M. and join petitioner and Thiel at a table, and saw the three converse together until Kerling left at about 9:45 P. M. (R. 67–68, 101–102, 272–273).[13] Kerling told petitioner that he and Thiel had come over together, and petitioner "had a hunch" that Kerling was here for the same purpose as Thiel (R. 143). Special Agents Fisher and Rice arrived and entered the Twin Oaks be-

[13] Until Fisher and Rice arrived, between 9:00 and 9:30 P. M., Willis remained outside the restaurant, but stood at a place from which he could see petitioner, Thiel and Kerling (R. 71, 102). Until then MacInnes was the only agent inside the restaurant (R. 71). After Fisher and Rice arrived, MacInnes, at about 9:25 P. M., left the restaurant to send a message to his office, but he returned in time to follow Kerling when the latter left (R. 67–68).

tween 9:00 and 9:30 P. M., and likewise watched the three conversing until Kerling left (R. 71, 73–74, 76–77, 80). When Kerling left he was followed and arrested by MacInnes, Fisher, Rice, and the Agent-in-charge of the New York Office, Donegan, who had also appeared on the scene (R. 68, 74, 80). Willis remained at the Twin Oaks watching petitioner and Thiel (R. 102). After the arrest of Kerling, Fisher and Rice returned to the Twin Oaks while petitioner and Thiel were still there (R. 74, 78, 80–81). Petitioner and Thiel left the Twin Oaks at about 11:00 P. M. (R. 74, 81, 102). Before that, but not until after Kerling had left, Thiel agreed to entrust his money to petitioner for safekeeping, but asked that he not put it all in the safe deposit box (R. 273)—that he "keep some of the money out in the event I need it in a hurry" (R. 109, 273). The arrangement was that whenever Thiel needed money he was to come to petitioner for it (R. 351). Thiel went to the washroom to remove the money belt from his person and handed it to petitioner on the street after they had left the restaurant (R. 273). Special Agents Fisher, Rice, Foster, and Willis all testified that they saw them leave and that they followed them to Thompson's Cafeteria (R. 74–75, 81, 86, 102). In Thompson's Cafeteria petitioner and Thiel conversed for another twelve or fifteen minutes (R. 75, 81, 84, 102). They agreed to meet again at Thompson's Cafeteria at 8:00 P. M. on

June 25 (R. 143, 274). They parted at the entrance to the Grand Central subway station (R. 75).[14] Thiel was followed and arrested that night (R. 81, 86). Petitioner was followed to his room and his movements were kept under continuous surveillance until his arrest on the evening of June 27 (R. 68–70, 84–85, 103–105, 110, 155–156, 156–157).

Petitioner put Thiel's money belt in a shoe box in his room (R. 87, 275). He made a memorandum, intended for Thiel (R. 276), of the denominations of the bills and of the fact that eight

[14] In summary of the evidence of the first and second overt acts, two witnesses (MacInnes and Willis) testified (R. 67–68, 101–103) that they saw the whole of the first—the meeting and conferring of petitioner, Thiel and Kerling. Two more (Fisher and Rice) testified (R. 73–74, 76–77, 79–80) that they saw the three in conference from between 9:00 and 9:30 P. M. until Kerling left at 9:45 P. M. Willis alone testified (R. 101–102) that he saw the whole of the continued meeting of petitioner and Thiel at the Twin Oaks after Kerling had left. Fisher and Rice testified that they returned in time to see the conclusion of petitioner's meeting with Thiel at the Twin Oaks (R. 74, 80–81). Four witnesses (Fisher, Rice, Foster, and Willis) testified to having followed them from the Twin Oaks to Thompson's Cafeteria (R. 74–75, 81, 86, 102). Four witnesses (Fisher, Rice, Stanley, and Willis) testified to having seen the whole of the second portion of the second overt act—the meeting between petitioner and Thiel at Thompson's Cafeteria (R. 75, 81, 84, 102). None of the agents testified to having heard any portion of the conversation between petitioner, Thiel, and Kerling, or between petitioner and Thiel (see R. 72, 73, 75, 79, 84, 85).

The court below (R. 486) treated the two conferences comprising overt act 2 as having been proved by the testimony of different sets of witnesses, and the same assumption is made

of them were gold notes (Gov. Ex. 66, R. 112).[15] He put $160 between the pages of a book in his room (R. 87, 100, 280) and on the morning of June 25 he put all but $20[16] of the balance in his safe deposit box at 86th Street branch of the Corn Exchange Bank, paying another year's rental in advance, although the box contained nothing else but an empty brown envelope (R. 103–104, 155–156, 159, 278–285). At 8:00 that evening he was at Thompson's Cafeteria for the purpose of keeping his appointment with Thiel, and spent about an hour and a half going back and forth between Thompson's and the Twin Oaks

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by petitioner in his brief here (p. 43). This assumption, as the foregoing summary shows, is erroneous; Agents Fisher, Rice, and Willis *each* testified both to the meeting at the Twin Oaks Inn and to that at Thompson's Cafeteria. Therefore, as shown in the argument, *infra*, pp. 71–74, it is not necessary in this case to reach the question discussed by the court below and decided adversely to the petitioner's contention (R. 486–487), namely, whether the same two witnesses must testify to the whole of the overt act or whether, on the the other hand, different portions of the overt act may be proved by different sets of witnesses.

[15] He doubted whether the gold notes were valid money, and intended to caution Thiel (R. 281).

[16] He deposited this $20, along with a $10 check from Thielmann in partial payment of a debt arising from the Florida delicatessen venture, in his savings account (R. 279, 280). The evidence shows that Thiel, when he left for Germany in March 1941, was indebted to petitioner in the sum of a little over $200, and that Thiel told him he could take payment of this sum from the money which Thiel entrusted to him (R. 245–249, 252–253, 269, 273–274). In petitioner's safe deposit box the eight gold notes, and the further sum of $200, were segregated from the rest of the money (R. 120).

(R. 104–105, 156–157). Thiel of course did not appear, as he was already in custody. The thought entered petitioner's mind that Thiel had been arrested (R. 353). He went to Thompson's and the Twin Oaks again on the evening of June 26 (R. 157), and this time he definitely suspected that Thiel had been arrested (R. 286, 353). He made no attempt as yet to get in touch with Thiel at the Commodore Hotel, although Thiel had told him that he was living there (R. 269). When he returned to his room that evening, Norma Kopp, Thiel's fiancee,[17] was there. She had appeared pursuant to a letter from petitioner, mailed June 25, in which he asked that she come, saying, without mentioning Thiel, that he had "sensational" news for her (R. 176–177, 277–278, 286–287). Although petitioner and Thiel had talked of her at their first meeting and petitioner at that time had offered to write her on behalf of Thiel (R. 263–264, 266), it was not until after the second meeting at which Kerling, the "leader" of Thiel's group, was present, that he wrote to her; and even then he did not mention Thiel's name. When she appeared in person he told her that Thiel was here; that "they came about six men with a

[17] Miss Kopp came from Germany in 1928 (R. 174) and had never been naturalized (R. 200–201). She became acquainted with petitioner and Thiel in May or June 1937 (R. 175, 257–258) and became engaged to Thiel shortly before he returned to Germany in March 1941 (R. 194, 199, 259).

U-boat, in a rubber boat, and landed in Florida;" that they "brought so much money along from Germany, from the German government," and that he was keeping Thiel's money for him in a safe deposit box; and that they "get instructions from the sitz [hide-out] in the Bronx what to do, and where to go" (R. 177–178).

The next morning (June 27) petitioner left a note for "William Thomas" at the Commodore Hotel, saying that Miss Kopp had come and asking that he meet them at Thompson's Cafeteria at 4:00 that afternoon or call them at 9:00 that evening at the Kolping House, the meeting house of a church society for persons of German background (R. 70, 105, 161, 162; Gov. Ex. 67, R. 113, 163). At 10:50 P. M. petitioner was approached at the Kolping House by agents of the Federal Bureau of Investigation and was asked to accompany them to the Bureau's headquarters in New York (R. 69–70, 105). There he was interviewed from about 11:20 P. M. until about 2:00 A. M., by Special Agents Willis and Ostholthoff (R. 106, 152). Both Willis and Ostholthoff testified, in proof of overt act 10 (R. 438), that petitioner told them that the name of the man who had been with him at Thompson's Cafeteria on the evening of June 23 was "William Thomas" (R. 106, 152), that in March 1941, "Thomas" had gone to work in a factory on the West Coast and had not been out of the United States from that time until

petitioner next saw him on June 22, 1942 (R. 106–107, 152–153); that upon being asked if the true name of "William Thomas" was not Werner Thiel, he replied that it was, and that Thiel was using an assumed name because of difficulties with his draft board (R. 106, 153); that with this partial correction he repeated the previous false statements (R. 107, 153); and that he further stated that the money belt which Thiel had given him contained only $200 which Thiel owed him, and that the $3,500 in his safe deposit box belonged to him, and had been obtained from the sale of securities (R. 107–108, 153–154). Willis alone testified to petitioner's having made the further statement that he kept the money in his safe deposit box because he thought it was safer there than in his savings account (R. 108).

Between an hour and an hour and a half after making the first of these false statements petitioner asked if he might speak with Ostholthoff alone (R. 108, 122, 154). They were left alone for between five and ten minutes, during which time petitioner recanted his previous false statements, admitting that he knew Thiel had come from Germany on a submarine on a mission for the German Government, and that he thought that Thiel had come "to stir up unrest among the people and probably spread propaganda" (R. 154–155). Willis then rejoined them, and petitioner

repeated his recantation (R. 108–110), stating that he had lied in order to protect Thiel (R. 108).[18]

Petitioner does not dispute that the evidence showed that he "actually, in the sense of physically, performed the acts alleged in the indictment" (Pet. Br., p. 4). Nor does he apparently question the conclusion of the court below that from all the testimony, including his own, "the jury could properly find that he knew some improper enterprise was afoot and that he intended to aid the enemy in its prosecution" (R. 480).[19] However, he contends that the overt acts submitted to the jury were all legally insufficient in that they "did not openly manifest treason"; that there was failure of compliance with the "two-witnesses" rule; and that the district court abused its discretion in admitting evidence which, in the light of the closeness of the issue before the jury,

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[18] Petitioner on direct examination admitted the making of these false statements, and that he had made them in order "to shield Werner" (R. 292). His admissions at the trial did not, however, extend to admitting any intentional attempt to protect Thiel in the execution of any enemy mission.

[19] In his brief in this Court petitioner makes the bare assertion, without supporting argument, that the evidence "as a whole failed to make out a case" against him (Pet. Br., p. 45). However, he concedes that the crucial issue was whether he "entertained that traitorous intent which is indispensable to the establishment of the crime" of treason, and states that this question of his intent "remained close throughout the trial" (Pet. Br., pp. 4–5).

could not have failed to prejudice him out of all proportion to its probative value (Pet. Br., p. 6).

All these contentions were decided adversely to the petitioner by the court below.

SUMMARY OF ARGUMENT

I. THE OVERT ACTS CHARGED AND PROVED WERE LEGALLY SUFFICIENT

It is not necessary, as the petitioner contends, in a trial for treason to charge and prove overt acts which "as of themselves, and unaided by any other evidence, manifest treason." Treason requires both a purpose to adhere to the enemy, giving them aid and comfort, and an overt act committed in order to effectuate such purpose. The requirement of an overt act is designed to preclude punishment of treasonable thoughts or plans which have not been translated into action, and the requirement of its proof by two witnesses is designed to reduce the danger of convictions based upon perjury. While the authorities sometimes describe an overt act as one which "manifests" the treasonable intent, they lend no support to the petitioner's argument that the act must in itself therefore reveal the actor's state of mind. They mean no more than that the mental design must have ripened into an observable and provable act.

Accordingly, while an overt act must be estab-

lished by the testimony of two witnesses before a conviction for treason can be secured, the second essential element of the crime—a treasonable intent—may be established by any relevant evidence. What any act "manifests" necessarily depends upon knowledge other than that which the act itself conveys. The proper test, we submit, is that the act must be a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, giving them aid and comfort, and must be related to, and in furtherance of, the accomplishment of the treasonable purpose. It is not necessary that the treasonable design shall be successful, nor that the act shall effectively accomplish the giving of aid and comfort to the enemy, nor that it shall in and of itself demonstrate the whole crime.

This understanding of the nature of an overt act is consistent with the early English authorities which were in large part accepted by the framers of the Constitution as guides to the definition of the crime of treason. It is supported in particular by *Lord Preston's* case, a leading English case in which the English treason statutes had been most recently construed at the time of the Federal Convention. It is also consistent with substantially all the American authorities. The petitioner's contention is supported only by

a statement by Judge Learned Hand in *United States* v. *Robinson*, 259 Fed. 685, 690 (S. D. N. Y. 1919). This statement, which was merely a dictum and did not purport to be carefully considered, is in conflict with the overwhelming weight of authority.

Properly tested, each of the three overt acts submitted to the jury in the instant case was sufficient in law. The jury's verdict, rendered on proper instructions from the trial judge, foreclosed the issue of the petitioner's treasonable intent. In the light of his established intent, and the circumstances surrounding his acts, as proved by competent evidence, the overt acts charged plainly constituted integral parts of a plan to give aid and comfort to the enemy. The first two acts charged, consisting of meetings with the enemy, in themselves afforded aid and comfort, and led to other proven efforts by the petitioner to assist the enemy's hostile mission. The third act submitted (overt act 10), consisting of false statements made to agents of the Federal Bureau of Investigation in order to shield Werner Thiel, one of the German saboteurs, likewise constituted a plain attempt to furnish aid and comfort to the enemy. Factually, the case is stronger than *Lord Preston's* case, in which no aid and comfort was successfully rendered to the enemy, and the overt act charged was totally innocuous on its face.

II. THE PROOF OF EACH OF THE OVERT ACTS SATISFIED THE TWO WITNESS REQUIREMENT OF THE CONSTITUTION AND THE STATUTE

Overt act 1 was concededly proved by the testimony of two witnesses. As to overt act 2, the petitioner contends that the proof was deficient in that different portions of the act were observed by different sets of witnesses. The two-witness requirement, however, does not mean that the same two witnesses must testify to the whole overt act, but rather that, if the act is separable, each of the separable portions must be proved by the testimony of two witnesses. The court below correctly so held. However, the question is not in fact presented by the record, since actually the whole of the overt act was proved by the testimony of the same two witnesses and more.

The petitioner contends that the proof of overt act 10 was deficient since only one witness testified to the making of a portion of one of the five false statements comprising the overt act. However, the court below correctly held that the substance of the act was fully proved by both witnesses who testified to its commission, and that under the circumstances the phrase omitted in the testimony of one of the witnesses was immaterial.

Furthermore, any deficiency that might otherwise have existed in the proof of overt act 10 was

supplied by the complete testimony of the petitioner himself, as a witness in his own defense. While the confession of a defendant in a treason case, made out of court, will admittedly not in itself supply the requirement of testimony by two witnesses to the commission of an overt act, there is no reason in principle or authority why the defendant's own testimony in court as to the commission of an overt act should not serve as the testimony of one of the necessary two witnesses to the commission of that act.

Application of the doctrine of the *McNabb* case (*McNabb* v. *United States*, 318 U. S. 332) to the testimony of the witnesses who established the commission of overt act 10 is urged by the petitioner for the first time in his brief in this Court. Even if the false statements attributed to the petitioner could be regarded as having been made during a period of illegal restraint, they constituted the operative facts of a crime charged against him, rather than a confession secured under circumstances implying duress. The voluntary and deliberate character of the petitioner's false statements is not disputed. Under these circumstances the doctrine of the *McNabb* case has no application.

III. THE PETITIONER'S ASSIGNMENTS OF ERROR IN THE CONDUCT OF THE TRIAL ARE WITHOUT MERIT

A copy of the Constitution of the United States, found in the possession of the petitioner

and having the treason section marked by him in his own hand, was properly admitted in evidence on cross-examination to test his treasonable intent and also his credibility in the light of his testimony that he had at no time been particularly interested in the law of treason. A question whether he had been warned by a relative against continuing to write letters unfriendly to the United States was likewise properly permitted in order to refresh his recollection, in view of his repeated denials on cross-examination that he had written any letters of such a character. As the petitioner admitted having received a letter containing such a warning, the question was not one based upon an assumed state of facts not proved. In any event, the rulings of the trial court in these respects were fully within its discretion in determining the proper scope of cross-examination of a defendant who takes the stand as a witness in his own defense.

There was likewise no abuse of discretion on the part of the trial court in permitting the introduction of concededly competent evidence as to the nature and scope of the mission of the German saboteurs to whom the petitioner was charged with having given aid and comfort. The right of the Government to prove the enemy character of the saboteurs is not disputed, and it was for the trial court to determine at what point, if any, the evidence on the issue became unduly cumulative and prejudicial to the petitioner.

ARGUMENT

I

The Overt Acts Charged and Proved Were Legally Sufficient

The basic contention of the petitioner is that overt acts, to be legally sufficient to sustain a conviction for treason, must be acts which "as of themselves, and unaided by any other evidence, manifest treason" (Pet. Br., p. 20).[20] In support of this contention the petitioner cites and quotes from cases, both English and American, in which in one form or another it is stated that a conviction for treason must be sustained by proof of an overt act which "manifests" the treason, or the treasonable intent. The pertinence of these cases does not lie in the meaning which the petitioner attributes to them. While they make clear that treason must be "manifested" by an overt act, they do not support the petitioner's contention as to the meaning of the word "manifest" as used in the law of treason.

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[20] Consistently with this contention, the petitioner's brief examines each of the three overt acts submitted to the jury and argues that none of them meets the constitutional requirement, in that each fails "openly to manifest treason" (Pet. Br., pp. 18–38). Overt acts 1 and 2 are categorized as involving "a mere meeting with an enemy" (Pet. Br., p. 35). Overt act 10 is criticized not only for its failure "openly to manifest treason" but also as falling within the doctrine "that mere words may not ordinarily constitute an overt act in treason" (Pet. Br., p. 36).

We submit that the petitioner has misconstrued the cases dealing with the legal sufficiency of overt acts of treason, and that, properly tested, each of the three overt acts submitted to the jury in this case was sufficient to sustain the conviction.[21]

A. THE OVERT ACTS, TO BE LEGALLY SUFFICIENT, NEED NOT SHOW ON THEIR FACE THE TREASONABLE INTENT

In considering the petitioner's contention that the overt acts must "as of themselves, and unaided by any other evidence, manifest treason," the court below made an extensive analysis of the relevant historical materials and concluded—correctly, we submit—that this restrictive conception of the overt act requirement is warranted neither by considerations relating to the nature of the

[21] As the petitioner points out (Pet. Br., p. 18), if any one of the three overt acts had been legally insufficient the trial judge would have committed reversible error in submitting it to the jury, since the jury, rendering only a general verdict without special findings as to the several overt acts, might have relied only on the legally insufficient act as a basis for its verdict. There is, however, no inconsistency between this rule and the rule noted by the court below in its opinion (R. 481) that a number of legally sufficient overt acts may properly be submitted to the jury even though the proof establishes only one of them. The trial court correctly charged the jury that the Government, to secure conviction, must "prove at least one of the three overt acts charged in the indictment by the testimony of two witnesses" (R. 442).

crime of treason nor by its history. The court said: "Any interpretation of Art. 3, § 3 [of the Constitution], which would require the overt act itself to demonstrate the treasonable intent would erect a requirement of quantity of proof into a limitation on the crime itself, rendering it as a practical matter almost nonexistent. * * * if such separation of proof into component parts is necessary, it would follow that the overt act would have to be proved first and the jury then pass upon the sufficiency of the intent thereby shown before any other evidence of intent be admitted. * * * In effect the overt act would then have to comprehend the whole treason, and proof *aliunde* of intent would be superfluous" (R. 485).

Concededly, conviction for treason requires both a treasonable intent and an overt act committed in order to effectuate such intent. The requirement of an overt act is designed to preclude punishment for treasonable plans, or wishes, or hopes, which have never transcended the realm of thought or academic verbal expression. A purpose of giving aid and comfort to an enemy, so long as it is not translated into action, is not punishable as treason. In this respect treason is no different from other crimes. As Sir James FitzJames Stephen put it: "No temper of mind, no habit of life, however pernicious, has ever been treated as a crime, unless it displayed itself in some definite overt act. * * * The

reasons for imposing this great leading restriction upon the sphere of the criminal law are obvious. If it were not so restricted it would be utterly intolerable; all mankind would be criminals, and most of their lives would be passed in trying and punishing each other for offences which could never be proved." Stephen, *A History of the Criminal Law of England,* 1883 ed., vol. 2, p. 78.

Clearly, therefore, a traitorous thought which has not been translated into a deed does not now constitute treason. However, this incontrovertible proposition of law has often been stated in a way which has tended to confuse rather than to clarify. The petitioner cites authorities in which it is loosely said that the overt act must "manifest" the treasonable intent of the actor. But the word "manifest," as commonly used in this connection, is ambiguous. The petitioner seeks to draw from it a conclusion that the act must in itself reveal the actor's state of mind. We submit, to the contrary, that it means no more than that the mental design must have ripened into a physical, observable, and provable act.[22] As we undertake to show later (*infra,*

[22] This meaning, for instance, was observed by Judge Mayer when, in *United States* v. *Fricke*, 259 Fed. 673 (S. D. N. Y. 1919), he charged the jury that a treasonable intention "must be manifested by what is termed an overt act," and, at the same time, that an overt act "in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime."

pp. 41–53), neither petitioner's quotations nor the cases from which they are taken support his conclusion that the judges, English and American, who have used the word "manifest" intended the restriction for which he contends.

We believe that the covert intent and the overt act, both necesary to the proof of treason, are separate and distinct, complementary and not overlapping elements of the offense; that while each must be proved, each may be proved by any relevant evidence which satisfies the jury (subject only to the constitutional requirement that the necessary overt act must be proved by the testimony of two witnesses); and that the proof of the commission of the overt act is not required to comprehend also the proof of the treasonable intent. It is difficult to imagine an act which in itself, without resort to other evidence, would *per se* establish the actor's treasonable intent. Let us suppose, for example, that in the present case it had been charged and proved that the petitioner had given Thiel and Kerling information as to the location of vital factories, airports, railroad terminals, or bridges. On the petitioner's test even such a showing would presumably be insufficient, since the act of communicating information would not in itself "openly manifest" a treasonable intent. To "manifest treason," in the petitioner's sense, the act would have to reveal also the petitioner's allegiance to

the United States, his knowledge of the enemy character of Thiel and Kerling, and his intent to give them aid and comfort as enemies of the United States. Even the act of giving them vital military information might, so far as the act itself showed, have been committed without knowledge that they were enemies, or without purpose other than idle gossip or boastfulness. But if petitioner's test were followed, other competent and convincing evidence of petitioner's knowledge and purpose would be inadmissible to place the act in its proper setting, and the act of informing the enemy would, as a matter of law, have to be held insufficient as an overt act of treason and withdrawn from the consideration of the jury.

We submit that the mere expression of the petitioner's proposed rule indicates its unsoundness. What any act "manifests" must depend on knowledge other than that which the act itself conveys. Suppose that Thiel had handed money to the petitioner across the table, in open view, at the Twin Oaks Inn. To Agent Willis or Agent MacInnes, watching the action, it might be readily apparent that the petitioner was attempting to aid and comfort an enemy by receiving funds for concealment, for they knew how Thiel had arrived and had reason to suspect the nature of his mission. To a waiter at the Inn the same act would have carried no such significance; it would have evoked

not even a suspicion of treasonable intent. Even the act of assisting Thiel and Kerling in their landing on Ponte Vedra Beach in Florida would "manifest" treason only if to the observer their enemy character were made plain by some such patent fact as their disembarking from a German submarine or their wearing German army uniforms. It must follow from the petitioner's test that even if he had openly received and harbored Thiel and Kerling upon their arrival, he would have committed no legally provable overt act of treason if they had arrived in ordinary American business suits.

Contrary to the petitioner's test, we believe that the relevant authorities, including those cited by him, support the view that an overt act need "manifest" treason only in the sense of showing to the jury, in the light of all the evidence in the case, that a treasonable design has been carried forward to the point of action in its furtherance. Its character and significance are to be judged not by what, to one observer or another, it may appear to be, but by its actual place in the effectuation of a treasonable design; and this is to be determined not merely from the testimony of those who watched it and gave evidence of its commission but from all the relevant evidence. The act of raising one's hand may appear to any observer wholly innocent; yet it may be the pre-

arranged signal to a confederate to assassinate a public official. Though such an act may superficially seem innocent, the Government is entitled to prove, by any other available evidence, either direct or circumstantial, that it is not what it appears to be but is in fact an act in furtherance of a treasonable design.

By this we do not of course mean that any act, however insignificant or unrelated to the accomplishment of a treasonable purpose, is a legally sufficient "overt act" merely because the actor at the time was engaged in the prosecution of such a purpose. The act must, we believe, be a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, giving them aid and comfort.[23] It must be related to,

[23] It is well established that, to constitute treason, the treasonable design need not have been successfully accomplished. See *United States* v. *Greathouse*, 26 Fed. Cas. 18, Case No. 15,254 (C. C. N. D. Cal., 1863), in which Field, C. J., in his charge to the jury (at p. 24), cited with approval Foster, *Treatise on Crown Law*, to the following effect:

"And the bare sending money or provisions, or sending intelligence to rebels or enemies, which in most cases is the most effectual aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted; for the party in sending it did all he could; the treason was complete on his part, though it had not the effect he intended."

Cf. *Rex* v. *Stone*, 6 Term Rep. 527, 529 (1796); *Rex* v. *Hensey*, 1 Burr. 642 (1758); *Trial of David Gregg*, 14 How. St. Tr. 1371, 1376 (1708); *Trial of David Maclane*, 26

and in furtherance of, the successful or anticipated accomplishment of the treasonable design. If the act be proved by testimony of two witnesses, its tendency to effectuate the design of aiding the enemy may be shown by any other competent evidence.

Furthermore, we submit that the authorities have not, as implied by the petitioner, crystallized those forms of aid and comfort to the enemy which are to be regarded as treasonable. The illustrations generally offered by the early judges and textual authorities naturally involved acts giving aid and comfort in a most obvious and extreme way;[24] but these illustrations have not been expressed, nor is there any reason to believe that they were intended, as exhaustive. The type of aid and comfort sought to be given may vary from case to case. As times and the techniques of warfare change the methods by which an enemy may be aided and comforted change also. The courts must decide whether, in the context of the whole case, the overt acts charged were an integral part of a program which was designed to, and tended

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How. St. Tr. 721, 795 (1797); *United States* v. *Doe*, 26 Fed. Cas. 907, Case No. 15,584 (C. C. D. C. 1814); *United States* v. *Pryor*, 27 Fed. Cas. 628, Case No. 16,096 (C. C. D. Pa. 1814); *Trial of Arthur Thistlewood*, 33 How. St. Tr. 682, 921 (1820).

[24] Cf. the illustrations given by Foster and Blackstone, cited at pp. 24–25 of petitioner's brief.

to, give aid and comfort to the enemy as such, in the sense of assisting the enemy in a hostile design, or facilitating its execution. If an act appears on all the evidence to be of such a character, and its commission is proved by two witnesses, then it is an overt act sufficient to support a conviction of treason.

The petitioner argues that if our construction of the term "overt act" is correct, "the two witness rule becomes meaningless verbiage and the protection sought to be afforded the accused is mere illusion" (Pet. Br., p. 23). But the history of the two witness rule does not support his contention. In providing that, unless the accused confesses his treason in open court, he cannot be convicted except "on the Testimony of two Witnesses to the same overt Act," the framers of the Constitution imposed a substantial safeguard against convictions based upon perjury. Under the English law as it stood at the time of the Federal Convention, the two witness rule in treason was satisfied by the testimony of one witness to one overt act and another to a different overt act (7 William III, c. 3, sec. 2; *Lilburne's Trial*, 4 How. St. Tr. 1269, 1401 (1649); *Trials of the Regicides*, 5 How. St. Tr. 947, 978 (1660); see VII Wigmore, *Evidence* (3 ed.), sec. 2038). The constitutional provision as originally proposed to the con-

yention merely required proof by the testimony of two witnesses, and Mr. Dickenson "wished to know what was meant by the 'testimony of two witnesses' whether they were to be witnesses to the same overt act or to different overt acts. He thought also that proof of an overt act ought to be expressed as essential in the case" (Madison, *Debates in the Federal Convention* (International Edition, 1940), p. 431). Later in the debate the following occurred (p. 434):

> It was then moved to insert after "two witnesses" the words "to the same overt act."
>
> Doct. FRANKLIN wished this amendment to take place—prosecutions for treason were generally virulent; and perjury too easily made use of against innocence.
>
> Mr. WILSON, much may be said on both sides. Treason may sometimes be practised in such a manner, as to render proof extremely difficult—as in a traitorous correspondence with an Enemy.
>
> On the question—as to same overt act (N. H. ay. Mas. ay. Ct. ay. N. J. no. P. ay. Del. ay. Md. ay. Va. no. N. C. no. S. C. ay. Geo. ay.).

Still later the words "or on Confession in open Court" were added by an amendment which was adopted by a vote of 7 to 3, "the negative States thinking the words superfluous." *Id.*, p. 434.

If, as the petitioner urges, the overt act in itself must prove the whole crime of treason, including the accused's treasonable intent, then the constitutional requirement means that all the essential elements of the prosecution's case must be proved by two witnesses—the same two witnesses. There is no indication whatsoever that, in requiring the testimony of two witnesses to the *same* overt act, the framers of the Constitution intended to extend this requirement of proof to every element of the offense. As the court below pointed out, acceptance of the petitioner's contention "would mean an extension of the scope of the two-witness rule beyond anything heretofore known in its varied history * * *" (R. 485).

On the other hand, rejection of the petitioner's contention does not, as he suggests (Pet. Br., p. 23), render "the two witness rule * * * meaningless verbiage and the protection sought to be afforded the accused * * * mere illusion." In view of the seriousness of the offense of treason, and the susceptibility of treason trials to the dangers of perjury and inflamed emotions,[25] the framers of the Constitution by the two witness rule

[25] See the observation of Dr. Franklin in the Federal Convention, quoted *supra*, p. 39. The policy of the two witness rule, as stated by Sir William Blackstone (*Commentaries*, III, 358), was to "secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages."

understandably endeavored to protect the rights of the accused by establishing a quantitative measure of proof unlike that applicable in prosecutions for lesser offenses. But such a quantitative test was feasible only with respect to the "overt act" element of the crime. Acts are inherently capable of being perceived and evidenced by the testimony of direct witnesses; intent, on the other hand, is generally not susceptible of this type of proof. The existence of a given intent can ordinarily best be gathered from other directly provable facts, such as letters or statements by the accused to others, confessions not made in open court, or even wholly circumstantial evidence. There is nothing in the history of the two witness rule which suggests that the quantitative measure made applicable to the proof of overt acts was intended to supersede the ordinary and appropriate rules of evidence under which intention has always been proved in courts of law. The authorities support our view.[20]

Since the constitutional provision is modeled upon the English law of treason, it has always been recognized that the elements of the offense are to be defined in light of the English law as of

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[20] *Case of Fries*, 9 Fed. Cas. 826, Case No. 5126, at p. 909 (C. C. D. Pa. 1799): "Two witnesses are necessary to prove the overt act. But the intent may be proved by one witness, collected from circumstances, or even by a single fact"; *Trial of David Maclane*, 26 How. St. Tr. 721, 797–798 (1797); *Halsbury's Laws of England* (2d ed.), Vol. VI, p. 424. Thus the treasonous intent may be proved by a confession, *Res-*

the time the Constitution was adopted.[27] As the court below pointed out, the debates in the Federal Convention "show that the framers were strongly influenced by the English law of treason * * *, and it is reasonable to suppose that they intended to give Art. 3, § 3, the same scope, as well as in effect the same phraseology, as the English statute then most recently construed in the famous *Lord Preston's* case * * *" (R. 482).

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publica v. *Roberts*, 1 *Dall.* 39, 40 (1778); *Case of Fries*, *supra*, at pp. 909, 914; *United States* v. *Lee*, 26 Fed. Cas. 907, Case No. 15,584 (C. C. D. C. 1814); *Trial of Francis Willis*, 15 How. St. Tr. 614, 623–625 (1710); it may be inferred from statements antecedent, *United States* v. *Greathouse*, 26 Fed. Cas. 18, Case No. 15,254, at pp. 24, 26 (C. C. N. D. Cal. 1863); *Trial of Sir William Parkyns*, 13 How. St. Tr. 63 (1696), or contemporaneous with or subsequent to the overt act, *Respublica* v. *Roberts*, 1 *Dall.* 39, 40 (1778); *Trial of Ambrose Rookwood*, 18 How. St. Tr. 139, 213–221 (1696); or it may be deduced from proof of knowledge which accompanied the commission of the overt act or by proof of conduct, such as other overt acts which, while not alleged in the indictment, serve to illuminate the intent that accompanied the commission of the overt act laid in the indictment. *Respublica* v. *Carlisle*, 1 Dall. 35, 38 (1778); *Trial of Sir John Wedderburn*, 18 How. St. Tr. 426, 427 (1746); *Trial of Sir Richard Graham* (*Lord Preston's Case*), 12 How. St. Tr. 645, 727–729, 740 (1791); *Trials of the Regicides*, 5 How. St. Tr. 947, 976–977 (1660).

[27] *United States* v. *Burr*, 25 Fed. Cas. 55, Case No. 14,693, at p. 159 (C. C. D. Va. 1807); *United States* v. *Greathouse*, 26 Fed. Cas. 18, Case No. 15,254, at p. 21 (C. C. N. D. Cal. 1863); *United States* v. *Hanway*, 26 Fed. Cas. 105, Case No. 15,299, at pp. 126–127 (C. C. E. D. Pa. 1851); McKinney, *Treason Under the Constitution of the United States*, (1918) 12 Ill. L. Rev. 381, 386.

Because *Lord Preston's* case (*Trial of Sir Richard Grahme*), 12 How. St. Tr. 645 (1691), is so significant a landmark in the law of treason, and because it involved the basic issue presented by the case at bar, the case warrants detailed analysis. Lord Preston was charged with giving aid and comfort to the enemy when England was at war with France. The indictment alleged as an overt act of treason that on December 30, 1690, Lord Preston and others hired a small boat at Surrey Stairs in the County of Middlesex, England, to take them to another vessel which would carry them to France. It was alleged that the defendants were proceeding to France in order to communicate military information to the enemy. The proof showed that, after the vessel set sail for France, Lord Preston and his associates were arrested when the vessel was in the County of Kent, England, and that papers containing military information of value to the enemy were there found on the person of Lord Preston's servant.

Since the indictment laid treason in Middlesex, Lord Preston contended that the proof was inadequate since there was no showing that a legally sufficient overt act of treason had been committed in that county. It was held, however, that the act of boarding the boat in the County of Middlesex was a sufficient overt act of treason. The colloquy between the defendant

and the judges, including Lord Chief Justice Holt, is most illuminating (12 How. St. Tr., at pp. 727–729):

> L. C. J. Holt. My lord, as to the first matter that your lordship makes a question upon, whether there be any act of treason proved in Middlesex, that does depend upon the proof of your lordship's being concerned in the papers; for if your lordship had an intention in carrying these papers into France, which speaks a design to invade this realm, your lordship took boat in Middlesex at Surrey-Stairs, in prosecution of that intention, there is an over-act in the county of Middlesex.
>
> L. Preston. Your lordship, and the gentlemen of the jury observe, these papers were not found upon me.
>
> L. C. J. Holt. No, my lord; but if it be proved that your lordship had an intention to carry these papers into France, and took boat in order to go with them into France, in the county of Middlesex, wherever your lordship acted in order to that design, that is treason, and there you are guilty. It is a treason complicated of several facts, done in several places.
>
> L. Preston. My lord, I humbly desire to know, whether they have been proved to be my papers?
>
> L. C. J. Holt. That is a question that must be left to the jury upon the evidence.

L. PRESTON. Nobody swears they are mine, nor were they found upon me.

L. C. J. HOLT. But what I am speaking to your lordship, is in answer to your question about the place; for you say, that there is nothing proved done in the county of Middlesex; now the question is, whether your lordship had a design to go to France with these papers? If you had, and if your lordship did go on ship-board in order to it, your taking boat in Middlesex in order to go on ship-board, is a fact done in the county of Middlesex.

L. PRESTON. It is not proved by any witnesses that I designed to go into France.

L. C. J. HOLT. That is before the jury upon the evidence.

L. PRESTON. I hope your lordship, and the jury will observe it is not proved, and in the next place, there are no papers taken upon me; with humble submission, there is no proof of any such thing.

L. C. J. HOLT. Well, how far your lordship was concerned in these papers, and whether you were going with them into France, is to be left, upon the evidence that hath been heard, to the consideration of the jury.

L. PRESTON. But I humbly submit that.

L. C. J. HOLT. Have you any more to say?

L. PRESTON. As to what I offer, that nothing has been proved in Middlesex, I hope your lordship will take it to be a point

of law, and then it ought to be argued; and I desire I may have counsel.

L. C. J. HOLT. No, it is a matter of fact only; but if you please, the rest of my lords the judges may give you their opinion: for this is a question upon a supposition that your lordship was guilty of a design of going into France, and this with a purpose to depose the king, and alter the government; then the question is upon such a supposition that you were guilty of that design, whether you were guilty in Middlesex or no?

L. PRESTON. My lord, they have not proved that design.

L. C. J. HOLT. We do not say it is taken for granted now, but it is a question upon a supposition. Now, my lord, I'll tell your lordship in short my opinion, the rest of the judges will tell you theirs: I am of opinion, if your lordship had such a design to go with these papers into France, and these papers were formed by you, or you were privy to the contents of them, then it is plainly proved, that you went into a boat in the county of Middlesex, in order to carry on this design, and that will make it a good indictment, and here is a plain overt-act of high-treason in Middlesex.

L. C. J. POLLEXFEN. I am of the same opinion; for your fact as to this particular point in law stands thus: You are indicted of high-treason in two points; one is, for conspiring to depose the king and queen,

and alter the government: and the other is, for aiding and assisting the French king, and his subjects, declared enemies, and in open war against the king and queen, and to invite the enemies of the kingdom to invade the kingdom. Now this design, and this help and assistance, are written in these papers; for they are instructions for the carrying on of this design. You, my lord, are the person that is charged to go with these papers to help on this design; you began your journey in the county of Middlesex, for according to the evidence, you took water at Surrey-Stairs, which is in the county of Middlesex, and every step you made in pursuance of this journey, is treason, where-ever it was: So then here is a sufficient proof of a fact in Middlesex.

L. PRESTON. That, my lord, is a point of law, and I humbly desire your lordship, that I may have counsel in this case. It is not proved by any body, that I said I would go into France; and in the next place, it is not proved that I had these papers about me; there has been no evidence given that I did take water with an intention to go with these papers into France.

L. C. J. HOLT. The Jury are to be judges of that.

And Lord Chief Justice Holt charged the jury (12 How. St. Tr., at p. 740) as follows:

Ay, but gentlemen, give me leave to tell you, if you are satisfied upon this evidence

> that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen, and make use of the papers to that end, then every step he took in order to it, is high-treason, wherever he went; his taking water at Surrey stairs in the county of Middlesex, will be as much high-treason, as the going a ship-board in Surrey, or being found on ship-board in Kent, where the papers were taken.

Clearly, therefore, *Lord Preston's* case refutes the argument made here by the petitioner. The overt act found to be sufficient in that case was in itself completely innocent and harmless; it plainly did not "openly manifest" Lord Preston's treasonous disposition. The case establishes that the overt act must be in furtherance of the treasonous intent (which the jury could find from all the evidence), not that the act must itself prove such intent. The petitioner in his brief (pp. 28–29) erroneously assumes that Lord Preston was found to have committed "a clear overt act of treason" in carrying papers into France to incite an invasion of England, and that therefore his boarding a boat in Middlesex was preparatory thereto and hence a sufficient overt act. It was neither alleged nor proved that Lord Preston carried papers into France; he was apprehended while still in England. As is un-

mistakably revealed by the portion of Lord Chief Justice Holt's charge to the jury quoted above (and quoted also in the petitioner's brief, at p. 28), the overt act of boarding a small boat in Middlesex was held to be legally sufficient if the jury were satisfied from the evidence that the defendant "was privy to this *design*, contained in these papers, and was going with them into France, there to incite an invasion of the kingdom * * *." [Italics supplied.]

Lord Preston's case does not stand alone in showing that, notwithstanding the ambiguity of expression in some of the English cases, the overt act was not required itself to disclose the accused's treasonous intent. In the *Trial of David Maclane*, 26 How. St. Tr. 721 (1797), the defendant was charged with giving aid and comfort to France during the French and Indian War. One of the overt acts alleged in the indictment was that, having acquired information of military value concerning the city of Montreal, "he departed from the parish of Quebec towards foreign parts, with intent to communicate it to the enemy" (p. 793–794). In charging the jury that each of the overt acts alleged was sufficient to prove treason, Chief Justice Osgoode of the Court of King's Bench for Montreal said (p. 795):

> So in the case of treason, if a traitorous intention is disclosed by words or writings, and they are followed up by any acts tend-

ing to execute such design, although it be not complete, it is sufficient to ground a charge of treason, and it is left to the oaths and conscience of a jury to say with what view such a step was taken, although the party is stopped short before the final purpose was carried into effect; for, common sense tells us, we ought not to wait till the mischief is completed.

In *Vaughan's Case*, 2 Salk. 634, 635 (1696), it was held that the mere act of cruising in an English vessel on the high seas was a sufficient overt act of adhering to the king's enemies if the purpose of the accused, as shown by the evidence, was to attack ships belonging to allies of England. Of the English authorities relied upon by the petitioner, the comparatively recent case of *Rex* v. *Casement*, [1917] 1 K. B. 98, is typical. Lord Reading there charged the jury as follows: "Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled." The petitioner finds support in this language for his contention that the overt act must itself establish a treasonable intent. But this language, like that contained in the other cases quoted in the petitioner's brief, is equivocal and unilluminating. The petitioner fails to cite a single English case where it was held, as he contends here, that an act innocent on

its face but shown by all the relevant evidence to be an act of treason was not sufficient in law to constitute an overt act. He relies solely upon loose, ambiguous language which neither supports nor refutes his interpretation of the overt act requirement.

Nor do the American authorities lend substantial support to the petitioner's contention. He places much stress upon the dictum of Judge Learned Hand in *United States* v. *Robinson,* 259 Fed. 685, 690 (S. D. N. Y. 1919), expressing "the gravest doubt of the sufficiency" of an overt act consisting of "a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent." The court below pointed out that "just how far he [Judge Hand] would have gone, if pressed to it, in applying his thought is not clear" (R. 485). It may be noted, also, that Judge Hand referred only to the charge of Lord Reading in *Rex* v. *Casement, supra*—a charge which, when read as a whole, falls far short of sustaining the view of the law which Judge Hand ascribed to it; he made no apparent attempt to review or analyze *Lord Preston's* case and the other relevant historical authorities. Plainly, therefore, the dictum in *United States* v. *Robinson, supra,* is not entitled to the weight which should be given to a considered judgment of Judge Hand.

United States v. *Fricke,* 259 Fed. 673 (S. D.

N. Y. 1919), arose before another judge of the same court at about the same time as the *Robinson* case. There one of the overt acts submitted to the jury charged the defendant with borrowing money from a bank with intent to give it to an enemy spy. The "act" charged was the act, wholly innocent in itself, of borrowing money from a bank. Judge Mayer, apparently not entertaining the doubts which troubled Judge Hand, instructed the jury that "an overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime" (259 Fed. at 677). In *United States* v. *Lee*, 26 Fed. Cas. 907, Case No. 15,584 (C. C. D. C. 1814), the court instructed the jury that the act of the defendant in purchasing food with the intention of delivering it to the enemy was a sufficient overt act of adhering to the enemy. And in *United States* v. *Pryor*, 27 Fed. Cas. 628, Case No. 16,096, at p. 630 (C. C. D. Pa. 1814), Justice Washington charged the jury that "if the intention of the prisoner was to procure provisions for the enemy, by uniting with him in acts of hostility against the United States or its citizens, which is chiefly pressed against him by the district attorney; then, indeed, it must be admitted, that his progressing towards the shore, was an overt act of adhering to the enemy, although no act of hostility was in fact committed." See also *United States* v. *Greathouse*, 26 Fed. Cas. 18, Case

No. 15,254. In the course of his charge to the jury in *Case of Fries*, 9 Fed. Cas. 826, Case No. 5,126, at p. 914, Justice Iredell stated:

> It is the opinion of the counsel for the prisoner that you must be convinced, not only of the fact by two witnesses; not only that he was concerned in a certain act; but that you must have the evidence of two witnesses, at least, by evidence drawn from the same place, that it was done with a treasonable intention, before you can pay any attention to any other evidence whatever. *The fact is that, when the overt act is proved by two witnesses, it is proper to go into evidence to show the course of the prisoner's conduct at other places, and the purpose for which he went to that place where the treason is laid, and if he went with a treasonable design, then the act of treason is conclusive.* [Emphasis supplied.]

And Judge Peters similarly charged the jury (p. 916):

> I think the overt act and the intention constitute the treason; for without the intention the treason is not complete. If a man goes for a private purpose, to gratify a private revenge, and not with a public or general view, it differs materially. *The intention may possibly be gathered at the place where the act was committed, or it may not; if not, evidence is admissible to prove it elsewhere.* [Emphasis supplied.]

In the recent case of *Stephan* v. *United States*, certiorari denied last Term, 318 U. S. 781 (see also 319 U. S. 783, 318 U. S. 746, 319 U. S. 423), among the overt acts sustained by the circuit court of appeals were the acts of the defendant in escorting an enemy from the house of a friend to the defendant's automobile, and in subsequently concealing the enemy's identity by referring to him in the presence of others as "a friend from Milwaukee" (133 F. (2d) 87 (C. C. A. 6, 1943)). Neither of these acts "openly manifested" the defendant's treasonous intent; both were wholly innocent in themselves.

We submit that the authorities do not support the petitioner's contention, and that, on the contrary, considerations of reason and authority substantiate the conclusion that "when the traitorous intention and design are clearly manifested and proved, any act which is related to the design and tends to effectuate it, is such an overt act as the definition of treason requires" (McKinney, *Treason under the Constitution of the United States*, (1918) 12 Ill. L. Rev. 381, 396).

B. EACH OF THE OVERT ACTS SUBMITTED TO THE JURY WAS LEGALLY SUFFICIENT TO SUSTAIN THE CONVICTION OF PETITIONER

From the verdict of the jury, rendered after proper instructions from the trial court, it must be assumed at this stage of the case that there

is no question but that the petitioner committed overt acts 1, 2, and 10, as charged in the indictment,[28] and that in so doing he had the treasonable intent necessary to a conviction for treason. As previously pointed out (*supra*, p. 21), the petitioner does not seriously question the conclusion of the court below that from all the testimony, including his own, "the jury could properly find that he knew some improper enterprise was afoot and that he intended to aid the enemy in its prosecution" (R. 480).[29] The evidence as to the knowledge which the petitioner gained from Thiel at their first meeting on June 22nd (*supra*, pp. 11–13) was fully sufficient to warrant a conclusion by the jury that the petitioner, in his later actions, intended to aid known enemies of the United States on a mission which, even though he might not have appreciated its exact scope and purpose, was obviously hostile to the United States. The trial judge correctly charged the jury that they must be satisfied beyond a reasonable doubt that the petitioner intended to aid Thiel and Kerling as enemies of the United States, and not merely out of personal friendship.[30] The jury's verdict, therefore,

[28] The petitioner does not dispute that the evidence established that he "actually, in the sense of physically, performed the acts alleged in the indictment" (Pet. Br., p. 4).

[29] See footnote 19, *supra*, p. 21.

[30] Specifically, the judge charged the jury that unless they were "satisfied beyond a reasonable doubt that the defendant's intention was to aid Thiel and Kerling, or either of

based as it was on adequate evidence and rendered under a proper charge as to the law, forecloses any contention that the overt acts were committed without the necessary treasonable intent. The sole question on this branch of the case is whether the acts charged and proved to have been done with this treasonable intent were "overt acts" as that term is used in the Constitution and in the statute under which the petitioner was convicted.

Under the preceding heading we have explained our view of the proper test to be applied in determining the legal sufficiency of overt acts in treason cases. As we have indicated (*supra*, pp. 35–36), an act, to be legally sufficient as an overt act, must be an act which is a part of a program or course of action the purpose and tendency of which are to adhere to the enemy, and to give them aid and comfort. Applying this test, we submit that each of the three overt acts here submitted to the jury was clearly sufficient in law. Each of the acts was directly related to, and in furtherance of, the accomplishment of the petitioner's treasonable design. Each translated the petitioner's treasonable intent and purpose of

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them, as enemies of the United States and agents of the German Reich, the defendant must be acquitted" (R. 439), and also that if the jury should find "that the acts testified to were committed solely out of friendship for Thiel and Kerling, or either, and without any intent or purpose to assist them in their hostile purposes, the defendant should be acquitted" (R. 440–441).

giving aid and comfort to the enemy into an objectively provable overt act.

Overt acts 1 and 2 charged that on the evening of June 23rd the petitioner did "confer, treat, and counsel with" first Thiel and Kerling together, and later with Thiel alone.[31] The witnesses who watched these meetings, and who testified at the trial that they had occurred, did not attempt to show at the trial what was said at the meetings. There was no need so to do, since the overt acts charged were the meetings, rather than the words said at them. But a large amount of other competent evidence was introduced from which the jury could find the significance of the meetings, as integral parts of a treasonable program, and as steps in furtherance of that program.

Let us consider the setting in which the meetings occurred. Thiel and the petitioner had been

[31] The petitioner asserts (Pet. Br., p. 20) that although overt act 1 alleged that he "did meet * * * and did confer, treat, and counsel with" Thiel and Kerling, and overt act 2 that he did "accompany, confer, treat, and counsel" with Thiel, in neither instance did the proof establish that he "did treat and counsel" with them, so that for the purposes of their legal sufficiency the acts must be treated as charging only that petitioner "met and talked with Thiel and Kerling or Thiel alone." It may be doubted whether the charge of "treating and counselling with" the enemy adds anything of significance to the charge that the petitioner "met and talked with" them; but even if these overt acts as charged in the indictment must, as the petitioner suggests, be regarded as modified by the proof, their sufficiency as overt acts remains unaffected, for they were still overt acts in furtherance of petitioner's treasonable design.

close friends for many years. They had lived together and had been engaged in business together. From these associations the petitioner knew that Thiel was an alien enemy, and that his sympathies lay with Germany (R. 251–252). He knew that Thiel in March 1941 had left the United States for Germany in anticipation of war between the two countries, and with the obvious desire to be on the German side in such a war (R. 251). Petitioner corresponded with Thiel in Germany (R. 328–329), and the tenor of his letters revealed enthusiasm and admiration for the German cause (R. 117–118, 331–332, Gov. Ex. 68).

In June of 1942 Thiel reappeared, mysteriously and furtively. His method of approach to the petitioner was in itself suspicious. A strange voice called petitioner's name from the hall of his rooming house, and on his failure to respond an unsigned note, in an unknown hand, was slipped under his door, directing him to meet "Franz from Chicago" at a named hour and place (R. 261–262). Petitioner, though he testified that he knew no "Franz from Chicago", and had been unwilling even to answer the unknown voice calling him (R. 262), nevertheless made his appearance at the rendezvous. According to his own testimony, he was startled, and asked several questions, only to be put off with evasive and noncommital replies (R. 263, 267). They talked together for several hours. Thiel mentioned the

money which he had brought from Germany, and expressed reluctance at carrying it around with him (R. 268). Petitioner offered to take charge of it and put it in his own safe deposit box. Thiel, while apparently agreeable to this, was still noncommittal (R. 269), and nothing was done about it that night. They talked of Thiel's fiancee, Norma Kopp, and when Thiel expressed interest in her but seemed unwilling to get in touch with her directly, petitioner offered to write to her himself (R. 263). Again, nothing was done that night. At Thiel's request they agreed to meet again the next night, not at petitioner's apartment, because Thiel had too many acquaintances there and did not want them to see him, but at the Twin Oaks Inn (R. 269).

The meeting thus begun the next evening at the Twin Oaks Inn, and continued at Thompson's Cafeteria, constitutes the first and second overt acts charged. After they met at the Twin Oaks Inn, Thiel told petitioner that they were to be joined by Kerling, and that Kerling had come over with him from Germany (R. 271). Kerling was in fact the leader of Thiel's group of saboteurs (R. 40). Kerling did not stay long (R. 272–273). After he left, Thiel and the petitioner talked for some time, and then Thiel brought up the subject of the money. He went to the washroom to take off his money belt. After they left the restaurant petitioner took the money belt and

money, and put them in his pocket. Thiel told him to take out the $200 which Thiel owed him, and also told him not to put all the rest in the safe deposit box, but to keep some in his room, so that he would not have to go to the bank all the time in the event Thiel had to call on him suddenly for some funds (R. 273–274, Def. Ex. C). Petitioner kept the money throughout the continuation of their conversation at Thompson's Cafeteria, and on returning to his apartment he put the money in a drawer and the money belt in his shoebox. The next evening he wrote Norma Kópp, as arranged with Thiel, asking her to come to New York for "great news," "a pleasant surprise," and "news of the most sensational nature," but cautiously avoided saying anything from which Thiel's arrival could be suspected (R. 277). Thiel himself had suggested that no mention of his name be made in the letter (R. 264). The following day petitioner put the bulk of Thiel's money in his safe deposit box (R. 279–281).

In the light of the setting in which the meetings charged as overt acts 1 and 2 thus occurred, we submit that the meetings, marked as they were by friendly and earnest discussion by the petitioner and two known enemies of the United States (R. 80), in themselves constituted aid and comfort to these enemies. Little imagination is required to perceive the advantage which such

meetings would afford to enemy spies not yet detected. Even apart from the psychological comfort which the meetings furnished Thiel and Kerling by way of social intercourse with one who they were confident would not report them to the authorities as a loyal citizen should,[32] the meetings gave them a source of information and an avenue for contacts with others. The meetings enabled them to be seen in public with a citizen apparently above suspicion, and thereby to appear to be mingling normally with the citizens of the country with which they were at war.

In aid of his argument that overt acts 1 and 2 are insufficient in law as overt acts of treason, petitioner points out that no case has been cited in which "a mere meeting with an enemy has been held to be a sufficient overt act of treason" (Pet. Br., p. 35). Doubtless the facts of this case have not been precisely duplicated, but that does not give the answer. We are not concerned with a "mere meeting", but with a meeting shown to have been an integral and essential part of the giving of aid and comfort to the enemy. The act of meeting here can no more be separated from its background and purpose than could the

[32] That their confidence was justified is shown not only by petitioner's failure to report his knowledge or suspicions to the authorities, but by his own admission of unwillingness to "betray a friend" even if he knew that the friend had come here as a German agent to spread enemy propaganda (R. 397–398).

act of boarding a small boat in *Lord Preston's Case, supra,* pp. 41–48,[33] the act of borrowing money from a bank in *United States* v. *Fricke, supra,* pp. 50–51, or the act of escorting a companion to an automobile in *Stephan* v. *United States, supra,* p. 53. Each is innocuous when viewed in isolation; each takes on its treasonable significance from the fact that it was an integral part of a design to give aid and comfort to the enemy, and was carried out in furtherance of that design.

Thus, the significance of the meetings is by no means confined to the relatively intangible forms of aid and comfort to the enemy mentioned above. The meetings were part and parcel of a far more specific program. Petitioner, though he might not have known the precise details of Thiel's mission, was fully aware of its seriousness, to such an extent that he warned Thiel that "anything that he might undertake would be ineffectual or useless" (R. 142). Thiel, on the other hand, needed a means to reach Norma Kopp without disclosing

[33] The petitioner seeks to distinguish *Lord Preston's Case* as showing merely that preparatory acts which might not themselves be legally sufficient may be admissible if they are connected with a design which is also proved by other legally sufficient overt acts. However, to sustain the venue in *Lord Preston's Case*, it was necessary to establish a legally sufficient overt act in the County of Middlesex. Furthermore, petitioner's suggestion is inconsistent with the principle upon which he himself quite properly relies—namely, that in a trial for treason each of the overt acts submitted to the jury must be sufficient as a matter of law (Pet. Br., p. 18).

his presence. He needed a place to hide the money he had brought from Germany. He felt petitioner out on these matters at their first meeting, on June 22nd. He arranged a meeting between petitioner and his own leader, Kerling, which could have had but one purpose, approval of his course in accepting petitioner's assistance. Following the meeting with Kerling, Thiel entrusted his money to petitioner. From that moment on, petitioner, and not he, carried the large sum of money in gold notes. If they had been arrested as they walked to Thompson's Cafeteria, or as they continued their conversation there, possession of the money would have cast suspicion on petitioner, not on him. And if still later the money were to be found in petitioner's safe deposit box it would be petitioner, not he, who would have to explain its presence.

Given, then, the petitioner's treasonable intent, as found by the jury, the meetings with Thiel and Kerling, and with Thiel alone, were integral, vital, and indispensable parts of petitioner's treasonable program of aid and comfort to the enemy. They gave aid and comfort in themselves. The case is much stronger than in *Lord Preston's Case*, where not only did the treasonable design as a whole fail before any actual aid and comfort could be brought to the enemy, but the overt act itself, the innocuous act of entering a small boat.

could in itself have afforded no aid and comfort even had the design as a whole succeeded. Here, not only did the overt act of meeting give aid and comfort in itself; it was an essential step towards efforts by petitioner to give further aid and comfort. He wrote Norma Kopp on Thiel's behalf, in such a way as to bring her to New York without arousing suspicion. He refrained from communicating to the authorities what even he admitted were "hunches" as to Thiel's hostile mission (R. 148–149), and when questioned by agents of the Federal Bureau of Investigation he deliberately lied as to the knowledge he had secured from the meetings, and as to Thiel's ownership of the money. He did all that according to his own testimony Thiel asked of him, and all that in the nature of the situation and the short time available lay in his power.

Nor is it material to the issue of law involved that the petitioner was not shown to have attempted aid and comfort to the enemy on any grand scale—to have furnished secret military information, to have assisted in blowing up aluminum plants, or to have secretly organized a fifth column. Though treason is the most serious of all crimes, degrees of gravity in the offense are clearly recognized in the power conferred by the Constitution on Congress to "declare the Punishment of Treason" (Constitution, Art. III, sec. 3),

and in the discretion which Congress under this power has conferred on the courts to fix penalties ranging from death down to imprisonment for only five years and fine of only $10,000.[34] When treasonable intent exists and an overt act is done in its furtherance, the crime of treason is committed. The magnitude of the aid and comfort furnished or attempted in the particular case does not determine the guilt, but only the punishment.

The 10th overt act is, we submit, also clearly sufficient as an overt act of treason. This act consisted in the giving of false information concerning Thiel to agents of the Federal Bureau of Investigation who were investigating his activities.[35] The obvious and necessary effect of petitioner's false statements—if believed, as he had no reason to suppose they would not be—was to conceal from the authorities the fact that Thiel, a Nazi agent, had just arrived from Germany by submarine on a mission for the German government, and that petitioner had secreted in his own safe deposit box $3,500 in American money which Thiel had brought from Germany to aid in his mission. It is difficult to conceive of an act tending more directly to aid an enemy. Petitioner himself admitted on the stand that his intent in making the false statements was to aid Thiel

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[34] Criminal Code, § 2, 18 U. S. C. 2, quoted *supra*, pp. 3–4.

[35] The false statements charged are summarized in the Statement, *supra*, pp. 19–20; see also footnote 46, *infra*.

(R. 292).[36] He did not know that Thiel was in custody at the time they were made, and his own admissions show clearly that he believed that Thiel could still be aided.

It is true that later in the course of the same interview with Agents Willis and Ostholthoff petitioner recanted his previous false statements. Petitioner does not now urge that this recantation deprived his previous false statements of such significance as they may have had as legally sufficient overt acts.[37] Nor does he apparently

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[36] He contended that he was trying "to protect Werner Thiel's identity" because he "knew he had had trouble with the Draft Board" and had been using the assumed name of William Thomas (R. 292). But petitioner, from his own testimony on the stand (R. 263–268, 270–272), knew that Thiel had just returned from Germany, and could hardly have supposed that it was only a draft board from which Thiel stood in need of protection. Furthermore, as shown by the testimony of Agents Willis and Ostholthoff (R. 107, 153), even after petitioner learned that the agents knew of the identity between Thiel and William Thomas, he repeated his false statements that Thiel had been working on the Pacific Coast and had not been out of the United States. Such repetition could not have been for the purpose of protecting Thiel merely from difficulties with his draft board.

[37] If a treasonable design to aid the enemy is once consummated by an overt act, the crime of treason is, of course, complete, and cannot be obliterated by future actions. When the overt act consummating the crime consists of false statements giving aid and comfort to the enemy, recantation should, we submit, have no greater palliative effect than recantation of false statements shown in support of a charge of perjury. See *United States* v. *Norris*, 300 U. S. 564, 574.

press upon the Court the position taken by Judge Clancy in *United States* v. *Leiner*, that false statements made to arresting officers cannot constitute an overt act of treason unless it is proved "that the prisoner knew or had reason to believe that the enemy alleged to be adhered to had not yet been apprehended and that the misstatements are such that their obvious result would be to avert the enemy's apprehension or aid his depredations, and further, such as could not exculpate the prisoner" (Pet. Br., Appendix I, p. 48).[38]

Somewhat inconclusively, however, the petitioner does suggest that overt act 10 may possibly

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[38] The unreported remarks of Judge Clancy (S. D. N. Y.) in directing a verdict for the defendant in that case are set forth in Appendix I of petitioner's brief.

We submit that Judge Clancy's position is extreme, and does not represent the law. Under his view, one who, with every reason to believe that the enemy he wished to aid had been apprehended, nevertheless made false statements in the faint hope that the enemy was still at large and in that event might be aided in his escape, would not be guilty of treason even if the faint hope proved well founded and the false statements achieved their purpose. Furthermore, the assumption that an enemy in custody cannot be aided treasonously is obviously unfounded. The present case is an illustration. If petitioner's false statements had been believed, as he clearly intended them to be, Thiel might have been released or held only on a charge of draft evasion, and a large sum of money might have been kept available for the further prosecution of Thiel's hostile mission.

Judge Clancy's requirement that the false statements be "such as could not exculpate the prisoner" is, we submit, likewise unsound. Presumably it is a mere corollary of the view, the correctness of which we have endeavored to disprove

be regarded as legally deficient on the ground that it consisted of oral statements made by him shortly after his arrest. Petitioner refers to general observations in the English authorities "that mere words may not ordinarily constitute an overt act in treason," and also to the practical likelihood "that in the fear and excitement attendant upon the arrest many people make false statements with a vague idea that in some way they may extricate themselves" (Pet. Br., p. 36).

We submit that these considerations, in the setting of this particular case, have no tendency to weaken the legal sufficiency of overt act 10. It is true that the act charged is an act consisting of words. But the reluctance of the law to attribute treasonable significance to "mere words" does not extend where, as here, the words themselves constitute operative acts capable of effectuating a treasonable intention. Statements

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(*supra*, pp. 29–53), that an overt act of treason, to be legally sufficient, must show on its face its treasonable character and must leave no possible room for any conceivable inference of innocence. In any event, the requirement is inconsistent with the cases holding that acts may be treasonable even if committed with more than one motive, such as the motive of self-interest or pecuniary gain (*Haupt v. Doane*, 79 U. S. 342, 347; *Sprott v. United States*, 87 U. S. 459, 463; *Charge to Grand Jury—Treason*, 30 Fed. Cas. 1036, Case No. 18,272, at p. 1037 (C. C. S. D. Ohio, 1861)). Application of such a requirement would be peculiarly inappropriate in a case such as this, where the petitioner testified that his false statements were intended to help Thiel, and that he was not trying to shield himself (R. 292).

of opinion, or even statements of intention, may not be treason under our law; but that does not mean that an act of aid and comfort to the enemy is immune to legal consequence merely because it takes verbal form. A most obvious act of treason would be the communication of secret military intelligence to the enemy—which could be done most effectively by the use of words; but so far as we know no authority has ever suggested that such an act would be any the less an overt act of treason because effected verbally.[39] Here, in overt act 10, we have not the use of words to convey intelligence to the enemy, but—if the jury believed that the proof supported the allegations in the indictment—the use of words to divert suspicion from the enemy. Words in such a context can substantially aid and comfort the enemy, and it was for the jury to decide whether the petitioner's words were in fact a constituent part of his attempt to render such aid and comfort.

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[39] Communication of intelligence to the enemy, whether oral or written (*Charge to Grand Jury—Treason*, 30 Fed. Cas. 1036, Case No. 18,272, at p. 1037 (C. C. S. D. Ohio 1861)), sending a letter to the enemy offering to join his forces (*Medway v. United States*, 6 Ct. Cl. 424, 433 (1870)), and advising, inciting, or persuading others to give aid and comfort to the enemy (*Charge to Grand Jury—Treason*, 30 Fed. Cas. 1034, Case No. 18,270, at p. 1035 (C. C. S. D. N. Y. 1861); *Rex v. Casement*, [1917] 1 K. B. 98, 99), have always been considered to be acts of treason, even though in a literal sense the acts consisted of words. See, generally, Warren, *What is Giving Aid and Comfort to the Enemy*, (1918) 27 Yale L. J. 331, 334–344.

Nor should the case be affected at this stage by the fact that the false statements constituting overt act 10 were made shortly following petitioner's arrest. When the words or other conduct of one under arrest take the form of an overt act which would be treasonable if done with treasonable intent, the mere possibility, or even probability, that they might have been affected by the arrest cannot justify withdrawing them from the consideration of the jury. It was the function of the jury to determine the intent underlying the petitioner's words, and to make that determination in the light of all the circumstances, including the circumstance of recent arrest.

II

Each of the Overt Acts Submitted to the Jury Was Proved by the Testimony of Two Witnesses Within the Meaning of the Constitutional Requirement.

Overt act 1—petitioner's meeting with Kerling and Thiel at the Twin Oaks Inn on June 23rd—was plainly proved by the testimony of four Special Agents, each of whom testified that he saw the petitioner in conversation with Kerling and Thiel at the Inn.[10] As we understand it, the petitioner does not claim that this overt act was

[10] Special Agents MacInnes and Willis were following Kerling. They both saw him enter the Inn at about 8:20 p. m. MacInnes followed him into the Inn, while Willis remained outside, but at a place where he could see the three

not sufficiently proved by the testimony of two witnesses. However, the petitioner challenges the sufficiency of the proof of overt acts 2 and 10, on the ground, as to overt act 2, that different portions of the act were proved by different sets of witnesses, and as to overt act 10, that one portion of the act was proved by one witness only. In addition, the proof of overt act 10 is challenged on the ground that the testimony of the Special Agents was inadmissible under the doctrine of *McNabb* v. *United States*, 318 U. S. 332. We submit that none of these grounds of objection is well taken.[41]

A. AS TO OVERT ACT 2

Both the court below (R. 486–487) and the petitioner in his brief in this Court (Pet. Br., p. 43) approach the proof of overt act 2 on the assump-

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in conversation. Between 9 and 9:30 Agents Fisher and Rice also entered the Twin Oaks Inn, and each of these agents likewise testified to having seen the petitioner sitting and talking with Kerling and Thiel. (R. 67–68, 73–74, 79–80, 101–102.) MacInnes left the Twin Oaks Inn at about 9:25 to report to his superiors, but returned in time to see Kerling leave the Inn at about 9:45 (R. 67–68), and MacInnes, Rice, and Fisher each followed Kerling out of the restaurant when he left (R. 68, 74, 80). Willis remained and watched Thiel and Cramer until they left at about 11:00 p. m. (R. 102).

[41] Since there is no contention that overt act 1 lacked the necessary proof by two witnesses, the case might seem to be governed by the accepted rule in conspiracy cases that any number of legally sufficient overt acts may be submitted to the jury, even though the proof is sufficient only as to one. As pointed out by the court below (R. 481) in such a situation

tion that it consisted of two phases,[42] which were separately observed by different sets of witnesses. On this assumption, the petitioner contends that the trial judge committed error in failing to charge the jury that the same two witnesses must testify to the whole of the overt act. On the same assumption, the court below rejected the petitioner's contention, holding that there is "no reason in policy or law to require the same two witnesses to the whole overt act" (R. 486).

We agree with the view of the court below. The overt act charged was a conference between the petitioner and Thiel at two places, and even on the court's assumption that the two separate phases of the conference were observed by different sets of witnesses, the conference as a whole was proved by the testimony of two witnesses and more.[43]

"it can be presumed upon a conviction that the jury has properly fulfilled its time-honored function of weighing the evidence and that its finding of guilt was based on the one sufficiently proved overt act." However, the petitioner contends that the trial judge committed legal error in his charge to the jury with respect to the proof necessary to establish an overt act consisting of several parts. While we do not concede any such error in the charge, we do concede that if any such error had occurred it would have rendered inapplicable the rule in question.

[42] Overt act 2 charged the petitioner with a meeting with Thiel first at the Twin Oaks Inn and later at Thompson's Cafeteria.

[43] Where at least two witnesses testify to having seen the defendant engaged in the overt act charged, it is unnecessary that they should have seen him at the same time and place.

But we submit that the petitioner poses, and the court below answered, a question not in fact presented by the record in this case. If it be assumed that the conference between the petitioner and Thiel charged in overt act 2 comprised separate phases each of which must be established by testimony of the same two witnesses, the record shows that this requirement was met. Agents Willis, Fisher, and Rice testified to that phase of the conference which occurred at the Twin Oaks Inn (R. 74, 80–81, 101–102). These three, together with Agent Foster, testified to having followed the petitioner and Thiel from the Twin Oaks to Thompson's Cafeteria (R. 74–75, 81, 86, 102). The same three, together with Agent Stanley, testified to having seen the whole of the phase of the conference which occurred at Thompson's Cafeteria (R. 75, 81, 84, 102). All phases of the conference charged in overt act 2 were thus

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United States v. *Mitchill*, 2 Dall. 348, 355–356, discussed with approval by Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. 55, Case No. 14,693 (C. C. D. Va. 1807), at p. 173; see also *United States* v. *Fricke*, 259 Fed. 673, 677 (S. D. N. Y. 1919); *Regina* v. *McCafferty*, 10 Cox Cr. Cas. 603, 608 (1867).

There is nothing contrary in the holding of Judge Learned Hand in *United States* v. *Robinson*, 259 Fed. 685 (S. D. N. Y. 1919). As pointed out by the court below (R. 486), Judge Hand was dealing with efforts to meet the two witness rule by two witnesses each of whom singly proved a separate part of the act.

proved by the testimony of the same three witnesses.

In this state of the record, the only possible criticism which could be directed at the proof of overt act 2 would be that the first *part* of the first phase of the conference was observed, and testified to, by but a single witness, Agent Willis.[14] However, we submit that such an argument would be without substance.[15] Overt act 2, as charged in the indictment, did not specify any length of time for the conference nor any specific time of its beginning or end. The indictment charged merely that the petitioner conferred with Thiel "on or about June 23, 1942 * * * for a period of time at the Twin Oaks Inn * * * and at Thompson's Cafeteria" (R. 4). The charge was fully proved by testimony from at least two witnesses that the petitioner and Thiel conferred at these two places for some period of time on the

[14] Agents Fisher, Rice, and MacInnes left the restaurant at about 9:45 p. m., when Kerling left, and followed him until he was arrested (R. 68, 74, 80). Agent Willis alone remained and watched the entire further conference between Thiel and Cramer at the Twin Oaks Inn (R. 102). However, Agents Fisher and Rice returned before the petitioner and Thiel left the Twin Oaks Inn, and all three followed the petitioner and Thiel to Thompson's Cafeteria and watched their further conference there (R. 74–75, 80–81, 102).

[15] It is not entirely clear whether petitioner presses this argument, but we answer it on the assumption that it is implicit in his contention "that there must be two witnesses to the *whole* overt act" (Pet. Br., p. 43).

evening of June 23, 1942. That they may also have conferred at the same places at other times not proved by the testimony of two witnesses is clearly irrelevant.

B. AS TO OVERT ACT 10

Overt act 10 charged the petitioner with five specific misstatements of fact made, immediately after his arrest, to Agents Willis and Ostholthoff, of the Federal Bureau of Investigation. Four of the misstatements, and a part of the fifth, were fully proved by the testimony of these two agents. The fifth misstatement charged was: "That $3,500 in his safe deposit box at the Corn Exchange Bank Trust Company, 86th Street Branch, belonged to him and to no one else, had been obtained by him from the sale of his securities, and was kept by him in a safe deposit box because he considered it safer there than in his savings account at said bank" (R. 6–7). Agent Willis testified to the making of all of this statement (R. 107–108); Agent Ostholthoff testified to the making of all of it except the final explanatory clause, that the petitioner kept the money in a safe deposit box "because he considered it safer there than in his savings account" (R. 154).

We submit that the court below was correct in holding (R. 487) that overt act 10 was sufficiently proved by this testimony. Two witnesses testified

unequivocally to the act in all important respects. In full detail they proved the first four falsehoods charged. As to the fifth, they both proved that the petitioner admitted the presence of the money in his safe deposit box and falsely stated that the money belonged to him and that it had been obtained by him from the sale of securities. In view of these proved allegations, the additional false statement (proved by only one of the witnesses) as to the *reason* for keeping the money in the safe deposit box cannot conceivably, we submit, be regarded as material. It is a mere surplus detail, which could not affect the substance of the overt act alleged and proved.

But there is a further answer. Agent Willis testified to every statement, material or immaterial. Even if the testimony of Agent Ostholthoff be entirely disregarded, the requirement of a second witness is, we submit, supplied by the testimony of the petitioner himself. The petitioner, taking the stand in his own defense, on direct examination testified clearly and completely to the making of all the false statements charged to him, and to their falsity. The proof supplied by his testimony was not inferential; it was compelling and inescapable.*

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* The petitioner's testimony in this respect was as follows (R. 292):

"Q. You say it was Mr. Willis, Mr. Ostholthoff, and perhaps some others who were questioning you?—A. Well,

We know of no ground in reason or authority for rejecting the unequivocal testimony of the defendant himself in a treason trial as to the objective facts of an overt act charged against him, or for declining to accept his testimony as the testimony of one of the necessary two witnesses.[47]

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there were four men if I recall correctly altogether, and everyone did a little questioning.

"Q. Now, is it a fact that when they first questioned you you lied to them?—A. I did; yes, sir.

"Q. And you are charged here with having told certain specific untruths.—A. I did; yes, sir.

"Q. And I want to ask you whether you told them these things. That you told them first that Thiel's name was Bill Thomas. Did you tell them that?—A. That is correct; yes, sir.

"Q. And that you told them also from March 1941 until June 1942 Thiel had been working in a factory out on the West Coast?—A. Yes; I don't deny that.

"Q. And that you told these men that Thiel had not been out of the United States for that period?—A. Yes, sir.

"Q. And that you told them that the money belt that Thiel had given you contained only a couple of hundred dollars that Thiel had owed you?—A. Yes, sir.

"Q. And, finally, that the $3,500 in the safe deposit box belonged to you and no one else and had been obtained by you from the sale of your securities, and was kept there because you considered it safer than a savings bank?—A. That is right."

[47] The legal sufficiency of the petitioner's own testimony to supply one of the necessary two witnesses, though not considered by the court below, was touched on briefly at the trial. On motion for a directed verdict at the conclusion of all the testimony, counsel for the petitioner stated, without citation of authority, that "statements by the defendant cannot under the constitutional definition and the statute supply

Treason, of course, is the most serious of all crimes. Because of its very seriousness trials for treason are likely to be affected by prejudice and to be subject to the dangers of perjury. The two witness requirement was designed to mitigate these dangers.[48] We see no reasonable basis for holding that acceptance of the testimony of the defendant himself as the testimony of one of the necessary witnesses in any way impairs the protection which the Constitution is designed to afford him.

We do not suggest that a defendant in such a case should be held to have given the "confession in open court" referred to in the last clause of the constitutional provision.[49] Clearly a defendant who admits the objective facts of an overt act charged against him, but seeks to explain them as innocent, and denies a treason-

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the proof. No statement by any defendant may do that. That is the rule in treason cases." Counsel for the United States denied the existence of authority for such a rule, but in order to avoid all possible question elected to go to the jury on only those three overt acts which had clearly been proved by the testimony of two witnesses in addition to the petitioner (R. 369-370).

[48] The Federal Convention consciously rejected the rule, developed in England, that treason could be established by the testimony of one witness to one overt act and another to another. See discussion of the debate in the Convention, *supra*, pp. 37-38.

[49] See *United States* v. *Magtibay*, 2 Philippine Reports 703 (1903). There the defendant in a treason case, testifying as a witness in his own behalf, admitted the facts of the overt

able intent, has made no "confession" of the whole crime of treason. Nor do we suggest that proof of a confession made out of court may serve as proof of the required overt act. But apart from confessions, the Constitution and the treason statute permit conviction upon proof of an overt act by two witnesses who may be, and without doubt frequently are, hostile to the defendant and subject to the temptations of perjury either in their own interests or those of the government. We submit that when a defendant, testifying voluntarily in his own behalf, makes on the stand statements which unequivocally establish his overt act, those statements are entitled to at least as much credence as the same statements from the mouth of a hostile witness, and should as a matter of law be accepted as the testimony of a necessary witness within the meaning of the constitutional and statutory requirements.[50]

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act charged, namely, that he had joined the forces of the enemy, but claimed that he had done so against his will, after capture, and with the intent of escaping as soon as possible. There was no other witness to this overt act. The court held, properly, that his admission was not a "confession" within the meaning of the treason statute there applicable, which imposed the same requirements of proof as are here involved.

[50] The petitioner did not, of course, admit the treasonable intent. But, as we have shown (*supra*, pp. 29–35), the intent of an overt act is a matter of inference to be drawn by the jury from all the evidence in the case, and need not be proved by the two witnesses who testify to the happening of the act. There is no greater reason for requiring that a defendant who

Overt act 10 is therefore sufficiently proved by the testimony of Agents Willis and Ostholthoff, and if any deficiency is held to exist in the testimony of Agent Ostholthoff, that deficiency is supplied by the testimony of the petitioner himself.

Petitioner, however, now urges, for the first time, that the testimony of both Agents Willis and Ostholthoff is inadmissible under, or by analogy to, the decision of this Court in *McNabb* v. *United States*, 318 U. S. 332. We submit that the doctrine of the *McNabb* case has no application.

This point, although not previously argued, was noticed by the court below with respect to its possible application to a written statement made by the petitioner and introduced in evidence at the trial, and was disposed of adversely to the petitioner (R. 480, note 2). It is now raised, not in the context in which it was discussed by the court below, but with reference to the admissibility of the testimony of Agents Willis and Ostholthoff to prove the making of the false statements charged as overt act 10. The contention now made is that, since the false statements were made after the petitioner accompanied the Special Agents to the headquarters of the Federal Bureau of Investigation, but prior to arraignment, the

serves as a witness to his own overt act should prove his intent than for imposing the same requirement with respect to the testimony of any other witness.

testimony of the agents to whom the false statements were made is subject to the same vice as inhered in the evidence of confessions excluded in the *McNabb* case.[51]

We submit that the doctrine of the *McNabb* case is totally inapplicable to the situation here presented. This is not a case of a confession of crime under circumstances which, as in the *McNabb* case, imply the danger of compulsion.[52] There

[51] Petitioner's false statements were made on June 27, 1942. The record recites that the petitioner was arraigned under the treason indictment on August 31, 1942 (R. 1), but is silent as to whether there was any prior arraignment on any charge. However, since on the testimony it is clear that the petitioner's false statements were made immediately upon his arrival at the Federal Building on the evening of June 27th, it appears probable that they were made prior to any arraignment.

[52] It may be doubted whether petitioner was under arrest at all; he had merely been requested to accompany the Special Agents to headquarters because they wanted to talk with him (R. 105). But in any event, the false statements were, by petitioner's own testimony, made deliberately and voluntarily, for the purpose of shielding his friend Thiel (R. 292). They were made immediately upon his arrival at the Federal Building in company of the Special Agents, at 11:20 on a Saturday night (R. 106), and before it would have been practicable for the agents to secure his arraignment on any charge. Cf. *United States* v. *Mitchell*, Nos. 514, 515, this Term, certiorari granted January 17, 1944, in which it is contended on behalf of the United States that the doctrine of the *McNabb* case is inapplicable to voluntary confessions made to arresting officers immediately upon arrest and prior to any practicable opportunity for arraignment. This contention, if upheld in the *Mitchell* case, would be sufficient in itself to dispose of petitioner's

is no contention or suggestion that petitioner acted otherwise than voluntarily. Petitioner's statements did not constitute an admission of incriminating facts made under putative duress; they constituted the operative facts of a crime charged to him. That he would have had no occasion to make the false statements if he had not been interrogated by the Special Agents, or that he might not have made them had he been arraigned before being interrogated, is beside the point. If the petitioner was under arrest, that fact bore on his actions only in the sense that it served as the stimulus to his own voluntary act of attempting to exculpate Thiel.

Indeed, the logical result of the petitioner's present claim would seem to be that no act committed by a person while under illegal restraint [53] could constitute a crime, or at least that a crime committed by a person while under illegal restraint could not be proved by the testimony of those who observed its commission. The proposition carries its refutation on its face. We do not believe that the *McNabb* case was intended to have any such force, nor that its doctrine is available here to exclude the testimony of Agents

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argument here; its rejection, on the other hand, would leave undisturbed the entirely separate distinction noted in the text.

[53] As noted above, footnote 52, we do not concede that the petitioner's false statements were made during illegal restraint.

Willis and Ostholthoff to the making of the false statements charged against the petitioner.

Accordingly, we respectfully submit that the requirement of the two witness rule was fully satisfied as to each of the three overt acts submitted to the jury.

III

The Petitioner's Assignments of Error in the Conduct of the Trial are Without Merit

The petitioner contends that the district court committed reversible error:

(a) In admitting in evidence a newspaper copy of the Constitution of the United States on which the petitioner had marked the section defining treason;

(b) In permitting the United States Attorney to ask him, on cross-examination, whether he had received a letter from his nephew, Norbert, warning him that his letters were so unfriendly to the United States that he was in danger of being put on a blacklist;

(c) In permitting the introduction of "an excessive amount of evidence" regarding the character and mission of the German saboteurs to whom he was charged with having given aid and comfort.

Each of these contentions was considered by the court below and decided adversely to the petitioner. We submit that the questions were correctly disposed of below. (R. 487–488.)

A. THE COPY OF THE CONSTITUTION

As pointed out by the petitioner (Pet. Br., p. 4) there was no dispute as to his actually having committed the specific actions charged in the several overt acts submitted to the jury. The petitioner himself admitted them on the stand, in all the detail charged. The crucial issue in the case was the intent with which the overt acts were committed. The petitioner took the stand in his own defense, and thereby subjected himself to cross-exa ination on matters directly relevant either to his credibility or to the intent with which he had committed the acts charged.[4]

On direct examination petitioner had testified that in his relations with Thiel in June of 1942 the thought had never occurred to him that he "might be aiding and abetting an enemy of the United States" and that he had at no time "any purpose or intent to hurt the United States or to help its enemies," or "to adhere to the enemies of the United States and to give them aid or comfort" (R. 297). Petitioner's defense, as a whole, was that though he might have acted stupidly or unthinkingly he had no treasonable intent. Against this background, the prosecutor asked him whether at any time he had been

[4] It is elementary that a defendant who takes the stand in his own defense subjects himself to cross-examination and impeachment to the same extent as any other witness (*Raffel* v. *United States*, 271 U. S. 494, 496; *Reagan* v. *United States*, 157 U. S. 301, 305).

"particularly interested in the law of treason" (R. 304). After a colloquy between court and counsel out of the presence of the jury, following which his counsel's objection to the question was overruled, he answered in the negative (R. 308). Thereupon the Government introduced in evidence, again over objection, a newspaper copy of the Constitution of the United States, found in the petitioner's possession and, by his own testimony, carrying marks made by his own hand against several provisions, including the provision defining the crime of treason (R. 308).

We submit that in this setting the relevance and materiality of the exhibit are obvious, particularly in the light of the petitioner's own testimony regarding it. He could not recall the exact reason why he had marked the treason paragraph, but explained that it was his habit "whenever I read, when something strikes my imagination or my curiosity, that I mark a paragraph" (R. 314). He could not on cross-examination recall exactly when he had made the mark, but his testimony placed it a little before his friend Thiel had left for Germany, in early 1941 (R. 313). The exhibit was material and relevant both to his intent, which in its nature could be proved only by circumstantial evidence, and to his credibility, in view of his denial that he had ever had any particular interest in the law of treason. The probative value may have been slight, but that was a ques-

tion for the jury, within the sound discretion of the trial court. The trial court's discretion in such matters is very wide, and should not be disturbed by appellate courts in the absence of clear abuse, of which there was none here.[55]

[55] "It is familiar law that where a case rests upon that character of evidence [i. e., circumstantial evidence] much discretion is left to the trial court, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." *Cline* v. *United States*, 159 U. S. 590, 592–593; see also *Beard* v. *United States*, 82 F. (2d) 837, 843 (App. D. C. 1936), certiorari denied, 298 U. S. 655; *Clark* v. *United States*, 293 Fed. 301, 305 (C. C. A. 5, 1923); *Merrill* v. *United States*, 40 F. (2d) 315, 316 (C. C. A. 5, 1930).

The petitioner cites only two cases in support of his contention that even though the exhibit might have had some probative value, it was improperly admitted in evidence. Neither case confirms his view. In *People* v. *Harris*, 209 N. Y. 70, 102 N. E. 546 (1913), the court reversed a conviction of murder in part because of the admission of evidence as to the defendant's previous relations with a prostitute. The court referred to the general rule that when a husband is charged with the murder of his wife his relations with other women may be shown as possible evidence of motive, but properly held the rule inapplicable to a showing of temporary relations occurring during a period of separation between the husband and the wife, and discontinued four years before the alleged murder. *People* v. *Razicicz*, 206 N. Y. 249, 99 N. E. 557 (1912), also cited by the petitioner, is closer to the case at bar, but carries no support for petitioner's position. On an indictment for murder by use of a bomb, the state introduced evidence that another bomb explosion had occurred not long before in a nearby place in the open country, and that at around the same time the defendant had acquired materials which might have been useful in constructing a bomb. The testimony as to the earlier bombing was held by the court of appeals to be admissible, as bearing upon the defendant's responsibility for the crime charged. The

B. THE WARNING IN NORBERT'S LETTER

On cross-examination, following a series of questions regarding the petitioner's attitude towards the United States as expressed in letters which he had written to Thiel and others in Germany during the year 1941, the petitioner was asked whether it was not a fact that his brother, through his nephew Norbert, had warned him that his letters discussed the United States in such an unfriendly fashion that Norbert's father thought that he (the petitioner) would be put on the blacklist because, according to Norbert's father, the letters went through an American censorship (R. 329). Over objection the court admitted both the question and the petitioner's answer, which was that he had received such a letter from his nephew Norbert (R. 330). The petitioner claims that the admission of the question and answer constituted reversible error.

We submit that no error was committed in this respect. On the issue of petitioner's intent questions as to his attitude towards the United States, as expressed in his letters, were proper cross-examination. The petitioner had denied (R. 329) that his letters, some of which were already in

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conviction was reversed not because of the admission of the evidence, but because upon a review of all the evidence the court concluded that direct evidence of the defendant's guilt, in the form of any overt act whatsoever on his part, was totally lacking, and that an inference of guilt could not properly be based merely on other inferences from circumstantial evidence.

evidence, were critical of or unfriendly to the United States. The question as to the warning in Norbert's letter was expressly asked for the purpose of refreshing his recollection (R. 329–330). On cross-examination the prosecutor is permitted to attempt to refresh the defendant's memory (*Hawkins* v. *United States*, 39 F. (2d) 294 (App. D. C. 1930); *Madden* v. *United States*, 20 F. (2d) 289, 293 (C. C. A. 9, 1927), certiorari denied, 275 U. S. 554; see *Wolk* v. *United States*, 94 F. (2d) 310, 313 (C. C. A. 8, 1938), certiorari denied, 303 U. S. 658; III Wigmore on *Evidence* (3d ed. 1940) sec. 730 (2)).

This is not a question like that presented in *Berger* v. *United States*, 295 U. S. 78, 84–88, involving improper questions based upon assumed facts never proved. The question was designed to probe the petitioner's recollection as to matters already properly in evidence, and dealt with a fact which the petitioner himself admitted—namely, that he had received a letter such as the prosecutor had described. Failure of the prosecutor to introduce the letter in evidence was not improper; a document cited to refresh a witness's recollection need not be produced when not called for by the witness (*Toplitz* v. *Hedden*, 146 U. S. 252, 254; *United States* v. *Dilliard*, 101 F. (2d) 829, 837 (C. C. A. 2, 1938); IV Wigmore on *Evidence* (3d ed., 1940) sec 1259).

The petitioner asserts (Pet. Br., p. 12) that the letter from Norbert "was not admissible on

any theory" and that the "alleged statements of petitioner's brother or the petitioner's nephew were obviously not binding upon the petitioner in any respect." This assertion, made without citation of authority, is itself open to some question. Though Norbert's letter was not in evidence, other letters from the petitioner to his family and to Thiel, of the type that evoked Norbert's letter, were already in evidence at the time the question was asked (see footnote 6, *supra*, p. 9). Just such a letter was involved in *People* v. *Colburn*, 105 Cal. 648, 651, 38 Pac. 1105 (1895), and although the letter was there held inadmissible in the absence of any showing that the defendant had received it or had known of its existence, the court commented that such a letter would be admissible "where the party receiving the letter has by his acts or conduct invited the sending of it to him." In *Cline* v. *United States*, 159 U. S. 590, telegrams addressed to the defendants were admitted as part of the Government's effort to establish by circumstantial evidence the existence of a conspiracy, and their admission was upheld by this Court on the principle that where a case rests upon circumstantial evidence "much discretion is left to the trial court, and its ruling will be sustained if the testimony which is admitted tends, even remotely to establish the ultimate fact" (159 U. S., at p. 593).

In any event, we submit that the court below correctly held (R. 488) that even if error had occurred in admitting the question and answer, the ruling was not substantially prejudicial. In view of the receipt in evidence of unfriendly letters concededly written by the petitioner (Exhibits 68, 69) the evidence as to Norbert's letter was merely cumulative and did not affect the substantial rights of the petitioner.[56]

C. THE EVIDENCE AS TO THE MISSION OF THE SABOTEURS

The petitioner complains (Pet. Br., pp. 14–18) that the trial court improperly permitted the introduction of an "excessive mass of evidence to establish that Thiel and Kerling were enemies of the United States."

We submit that the evidence admitted on this issue was not excessive. The whole of it, including colloquies of counsel, covered only 37 (R. 30–67) out of 340 (R. 27–367) pages of the testimony in the printed record. Establishment of the enemy character of Thiel and Kerling was essential to the Government's case. Petitioner sought to remove the issue from the case by admission of counsel that Thiel and Kerling were enemy spies (R. 17); but the Government was not precluded by this admission from establishing an essential fact of its case by direct testimony, and

[56] See Judicial Code, Section 269, 28 U. S. C. 391.

petitioner's counsel so conceded at the trial (R. 38), and so concedes here (Pet. Br., p. 17).[57]

Petitioner did not at the trial (cf. R. 48), and does not now, challenge the competency of the evidence on this issue. The most dramatic evidence—the testimony of Ernest Peter Burger, one of the saboteurs, as to the nature of the mission of the saboteurs (R. 30–43), and the exhibits introduced while he was on the stand—was introduced without objection.[58] Objection was thereafter made to the introduction of further evidence on the same

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[57] "It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove if the presiding justice in his discretion deems it proper to receive it. Parties as a general rule are entitled to prove the essential facts, to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight". (*Dunning* v. *Maine Central R. R. Co.*, 91 Me. 87, 97 (1897); see also *Davis* v. *Emmons*, 32 Ore. 389, 391–392, 51 Pac. 652 (1898)).

[58] In the trial of James Ings for treason the prosecution introduced in evidence "thirty-eight ball cartridges, firelock and bayonet, one powder flask, three pistols, and one sword, with six bayonet spikes, and cloth belt, one blunderbuss, pistol, fourteen bayonet spikes, and three pointed files, one bayonet, one bayonet spike, and one sword scabbard, one carbine and bayonet, two swords, one bullet, ten hand-grenades," and the witness was permitted to demonstrate to the jury their use. These exhibits were received without objection, although counsel for the defendant in summing up cautioned the jury not to give undue weight to "a display of visible objects" (*Trial of James Ings*, 33 How. St. Tr. 957, 1051, 1088 (1820)).

subject, on the ground that it was cumulative and prejudicial; but the Government was not obliged to rely exclusively on the testimony of Burger, himself a convicted saboteur. The exact character of the mission of Thiel and Kerling was a vital element in determining not only petitioner's guilt, but the gravity of his offense in giving them aid and comfort.[89] The petitioner complains only that at some indefinite point the continued receipt of evidence on this issue became improper. But whether at some point the evidence became unduly cumulative or repetitious was a question for the discretion of the trial court,[90] and we submit that no abuse of the trial court's discretion in the matter has been shown.

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[89] "His plea was not guilty, and he could not prevent the introduction of competent evidence to prove every element of the crime charged by admitting a part of them. The People were entitled to present to the jury all the facts, in order that they might have proper weight in determining criminal intention and what the verdict ought to be, as well as to decide whether the punishment should be by a fine, only, or by fine and imprisonment * * *" *People* v. *Munday*, 293 Ill. 191, 206, 127 N. E. 364 (1920), certiorari denied, 254 U. S. 638. See also *Abshier* v. *People*, 87 Colo. 507, 524–525, 289 Pac. 1081 (1930); *State* v. *Griffin*, 218 Ia. 1301, 1311–1312, 254 N. W. 841 (1934).

[90] Wigmore points out that "there should be no absolute rule on the subject; and the trial court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances" (IX Wigmore on *Evidence* (3d ed., 1940) sec. 2591).

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

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No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1944

ANTHONY CRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

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BRIEF FOR THE UNITED STATES ON REARGUMENT

PRELIMINARY STATEMENT

This brief is submitted in response to the order of this Court on June 12, 1944, directing reargument and providing:

> Further briefs and argument are desired as to the questions raised under the treason clause of the Constitution, particularly as to the meaning of "treason" and of "overt act" and as to the requirement that such overt act be proved by testimony of two witnesses; also as to whether each overt act submitted to the jury complied with the Constitutional requirement.

A full statement of the pertinent facts is contained at pages 4–22 of our brief submitted on

the prior argument, and there is no need for detailed restatement here. However, a brief summary of the nature of the case, and of the conflicting contentions of the parties, may be useful as a setting for the discussion of the legal issues.

Cramer, the petitioner, was indicted and convicted in the United States District Court for the Southern District of New York for that form of treason against the United States which consists, in the language of Section 3 of Article III of the Constitution, "in adhering to their Enemies, giving them Aid and Comfort." The indictment alleged ten overt acts, but at the conclusion of the evidence seven of these were withdrawn by the Government, and three only were submitted to the jury. The petitioner contends that no one of the three acts thus alleged and submitted was a sufficient "overt act" to support a conviction of treason under the Constitution. The sufficiency of each of them as a matter of law was, however, upheld both by the district court and by the circuit court of appeals in affirming the conviction. This question of the sufficiency of the overt acts lies at the root of the legal questions on which the Court has directed reargument.

The facts of the case, except in the matter of petitioner's intent, are little in dispute; indeed, most of them were proved not only by the Gov-

ernment's witnesses but by the petitioner himself, testifying in his own defense. The petitioner is an American citizen of German origin. For many years prior to 1941 he had been intimately associated with Werner Thiel, one of the eight German saboteurs whose conviction by a military court came before this Court in *Ex parte Quirin*, 317 U. S. 1. In March, 1941, Thiel, a thorough-going Nazi in his views, left for Germany in anticipation of war with the United States; and during his absence, at least down to November 1941, a friendly correspondence was maintained between him and petitioner.

In June, 1942, Thiel returned by German submarine, and promptly sought out his friend. The means by which their first rendezvous was arranged were somewhat mysterious, in that Cramer, by his own testimony, received an anonymous note directing him to meet an unknown "Franz from Chicago" at a stated time at the Grand Central Station in New York. He responded. "Franz" was Thiel, and the two spent some time together, both that evening and the next. During the second meeting they were joined for a part of the time by Kerling, who was the leader of the group of saboteurs with whom Thiel had landed in Florida. Following this meeting, Thiel, unknown to Cramer, was arrested. During the course of the next few days Cramer made several attempts to get in touch with Thiel.

From the time of the second meeting with Thiel, Cramer's movements were under constant surveillance, and four days later, after leaving a note for Thiel under a pseudonym, William Thomas, at the Commodore Hotel, he was approached by agents of the Federal Bureau of Investigation and questioned by them regarding Thiel. During the course of the interview he made specific false statements as to Thiel's identity and his movements, for the purpose of "trying to shield" his friend. Later in the course of the same interview he recanted these false statements.

So much is undisputed. As to the subject matter of Cramer's conferences with Thiel, and the extent of his knowledge of Thiel's mission, there is some conflict between Cramer's own testimony and the testimony of others as to what he told them about the conferences. The disparity of testimony is not great, however; at the least, it is conceded that Cramer learned from Thiel that he had come here from Germany, with a large sum of American money in cash; that he knew, or suspected, that Thiel had come clandestinely on some kind of mission for the German Government; that he offered to take charge of the money for Thiel; that during the course of their meeting on the second evening Thiel handed the money over to him, together with the money belt in which it had been carried; that he put a large part of

the money in his safety deposit box; and that he kept about $160 of it in his room so that Thiel could get at it quickly if necessary. Testimony by Norma Kopp, Thiel's fiancee whom at Thiel's request petitioner summoned to New York, and by the Federal Bureau of Investigation agents to whom he made a statement, attributed to him somewhat greater knowledge of Thiel's activities and purpose than he was willing to admit on the stand. However, he admitted without equivocation his false statements to the Federal Bureau of Investigation for the purpose of shielding Thiel's identity and movements, ascribing as motive a desire to protect Thiel from "trouble with the Draft Board."

Of the three overt acts submitted to the jury, two related to the meeting with Thiel on the second evening; the third related to the interview with the Federal Bureau of Investigation agents. Overt act 1 dealt with the portion of the second meeting at which Kerling also was present, alleging that at a given time and place Cramer "did * * * meet * * * confer, treat, and counsel with" Thiel and Kerling for the purpose of giving them aid and comfort as enemies of the United States. Overt act 2 dealt with the later portion of the same meeting, after Kerling left, alleging that at two places Cramer similarly "did accompany,

confer, treat and counsel with" Thiel as an enemy.[1] Overt act 3 (No. 10 in the original list) alleged five specific false statements to the Federal Bureau of Investigation agents regarding Thiel's identity and whereabouts; and regarding the source of the money in the safety deposit box, all made for the purpose of giving aid and comfort to Thiel as an enemy of the United States. In view of the judge's charge, that for conviction the jury must find that aid and comfort were extended to Thiel and Kerling not out of friendship, but "as enemies of the United States and agents of the German Reich", the treasonable intent with which these acts were performed must be taken as established by the verdict of the jury.

Thus the issue between the parties, at least on this reargument, narrows down essentially to a question of the legal sufficiency of the three overt acts under the Constitution of the United States. In his first brief the petitioner contended that the

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[1] Cramer, by appointment, met Thiel at the Twin Oaks Inn on Lexington Avenue. Shortly after they met, Kerling arrived. He stayed talking about an hour and a half. This conference with him and Thiel was the first overt act. After he left, Cramer and Thiel continued the conference, during the course of it paying their bill, walking down the street, and stopping in for a few minutes more at Thompson's Cafeteria. This continued conference, at both the Twin Oaks Inn and Thompson's Cafeteria, was the second overt act. Although it was not alleged in the indictment, the proof showed that it was during this continued conference that Thiel divested himself of the money belt and handed it over to Cramer, who carried it through the rest of the conference.

acts were legally insufficient in that they were not such acts "as of themselves, and unaided by any other evidence, manifest treason." In his brief on the reargument the petitioner proposes a new definition—that the overt act "must be such an act as, when coupled with evidence of the accused's owing of allegiance to the United States, and a traitorous intent, would warrant the submission of the case to the jury." It is not entirely clear whether the new definition is intended to supersede the old; plainly the two do not attempt to apply the same considerations in determining the legal sufficiency of overt acts in any given case. However that may be, we take issue with both definitions, and with petitioner's ultimate conclusion as to the insufficiency of the overt acts in this particular case. This issue between the parties, when analyzed in detail, evokes the several questions raised by the Court in its order for reargument, namely, (1) the meaning of treason; (2) the meaning of "overt act"; (3) the meaning of the requirement that such overt acts be proved by the testimony of two witnesses; and (4) whether each of the three overt acts submitted to the jury complied with the constitutional requirement.

These several questions cannot, we believe, profitably be separated for discussion. The "treason" and the "overt act" interlock; neither is meaningful without understanding of the other.

So with the two-witness requirement; though it is superficially a mere procedural safeguard applied to the proof of overt acts, search for its significance requires search for the significance of overt acts generally in the scheme of treason. And, since the case is a concrete conviction for treason, discussion of these broader questions must be shaped at least in part by reference to determination of the legal sufficiency of the particular overt acts here involved. The answers to all the questions posed by the Court, therefore, must be permitted to emerge from a comprehensive study and analysis of the origins and history of treason, as developed through constitutional and legislative provisions, judicial decisions, and comment by text-writers.

We have undertaken such a study and analysis of the origins and history of treason. Although the extraordinary paucity of competent modern secondary sources might suggest otherwise, the materials in the field are in fact voluminous. Moreover, since this case involves the first treason conviction considered by this Court in its history, we have thought it appropriate to present not merely the materials which appear directly relevant to the precise issues of this case, but also materials tending to show the absence of valuable precedent at particular periods of history, in order that the Court may have before it the fullest possible picture of the development of the law of treason. The results of research covering such

a range cannot be fully presented within the compass ordinarily appropriate to a brief, and we consequently submit them in the form of a series of appendices, which for historical background may be read independently of this brief, and to which we shall make continual reference in the course of our argument. A list of the appendices is set out in a footnote below.[2]

These appendices are not presented as necessarily expressing the views of the Government on the legal and historical questions considered therein. They have been prepared at the request of

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[2] APPENDIX A. *Civil and Canon Law Materials*
I. The Crime of High Treason from the Romans to the Second Half of the 18th Century.
II. Treasonable Crimes under the Criminal Codes of Continental Europe.
III. The Two-Witness Requirement in Canon Law.
APPENDIX B. *Anglo-American Materials*
Introduction and Bibliographical Note
I. Treason in England
1. Treatises
(a) Early English Treatises.
(b) Treatises Published in the 18th Century.
(c) Treatises Published in the 19th and 20th Centuries.
2. Statutory Evidence of English Policy Regarding Treason.
3. English Case Law Prior to 1790.
II. Treason in America
1. Treason Down to the Constitution
(a). Prior to the Revolution.
(b) The Revolution—1775–1783.
(c) The Constitution.
2. Treason Under the Constitution.

the Solicitor General by persons in the main not connected with the Department of Justice, but believed to be fully qualified by training and experience in the respective fields assigned to them.[5] The authors of the appendices were requested to avoid argumentative support of any particular position, and to select material for inclusion or exclusion solely on the basis of its reliability and its relevance to the questions under review by the Court. At the same time we have recognized that the task of intelligently selecting material for these studies inevitably involves a

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[5] Parts I and II of Appendix A, dealing with treason in civil law, were prepared, respectively, by Dr. Elio Gianturco, Research Assistant to the Foreign Law Section of the Law Library of Congress, and Dr. V. Gsovski, Chief of the Foreign Law Section of the Law Library of Congress. Part III of Appendix A, dealing with the two-witness requirement in canon law, was prepared by Dr. Stephan G. Kuttner, Professor of the History of Canon Law, The Catholic University of America, and Honorary Consultant in Canon Law to the Library of Congress.

Appendix B, dealing with the history of treason in English and American law, was, with the exception of the section dealing with English case law prior to 1790, prepared by Willard Hurst, on leave as Associate Professor of Law, University of Wisconsin, whose services were made available through the courtesy of the Navy Department. The section on English case law prior to 1790, although revised and edited by Professor Hurst, was primarily prepared by attorneys on the staff of the Department of Justice.

The preparation of the appendices was made possible by the courtesy and cooperation of Professor Eldon R. James, Law Librarian of Congress, who freely made available both the facilities of the library and the extremely valuable services of many members of its staff.

factor of personal judgment on the part of the authors of the studies, and, further, that such studies would lose much of their value if the views of the authors as to the significance of the material with which they have dealt were eliminated. Consequently, we have chosen to present the studies to the Court in the form in which they were prepared and submitted to us, and we offer them as constituting in our judgment a fair, dispassionate, and informative analysis of the history of the law of treason. In so offering them we do not in any way assume responsibility for, or necessarily agree with, all the inferences drawn or the conclusions expressed by the authors.

Our own consideration of the relevant historical materials, both at first hand and as presented in the studies in the appendices, has satisfied us as to the general soundness of our position adopted on the original argument, and hence in this brief we shall contend again that all three of the overt acts submitted to the jury were legally sufficient and adequately proved, and that the petitioner was properly convicted of treason. In support of our argument we shall not only refer as occasion may demand to the material contained in the appendices, but shall for convenience of presentation restate in summary form those portions of the material which appear most directly relevant to the course of our argument.

ARGUMENT

INTRODUCTORY

In his first brief, the petitioner contended that overt acts, to be legally sufficient, must be acts which "as of themselves, and unaided by any other evidence, manifest treason" (Pet. I Br., p. 20).[1] Entirely apart from historical considerations, the application of this test sought in that brief affords no satisfactory demonstration of its soundness or practicability. As we pointed out in our first brief (I Br., pp. 32–34), the significance of any act—what it "manifests" to an observer—cannot be determined *in vacuo*, but must depend upon the extent of the observer's own knowledge, his perceptions, and his alertness to implications. Nor can the significance of an act as treason necessarily be perceived by even the most acute observer, for every act—even the obvious act of bearing arms with the enemy—is susceptible of explanation and justification in terms of purpose.[2] Petitioner's proposed test

[1] For convenient distinction, we refer herein to petitioner's first brief as "Pet. I Br.", and to his brief on reargument as "Pet. II Br." Our own original brief is referred to as "I Br.".

[2] Cf. *United States* v. *Schulze*, 253 Fed. 377, 379 (S. D. Cal., 1918), an Espionage Act case:

"Intent is a necessary element of this offense, notwithstanding the absence of the words 'willfully' and 'intent.' Words spoken in one set of circumstances may mean an entirely different thing from words spoken in another set of

may therefore be criticized as resting on a fundamental misconception of the nature of an act. Moreover, it is elementary that a treasonable intent—an intent to betray allegiance—is necessary to the crime of treason, so that if an overt act must "manifest" the treason in the sense used by petitioner it must in effect comprehend the entire crime, rendering superfluous, or at least merely corroborative, all proof extrinsic to the overt act itself. By the petitioner's test the overt act becomes no more than a prescribed method of proving the entire crime, rather than a distinct element of the crime.

It may be that analytical difficulties of this character are in part responsible for the petitioner's apparent abandonment of the test proposed in his original brief. Whatever the cause, the petitioner now advances an alternative test: that an overt act "must be such an act as, when coupled with evidence of the accused's owing of allegiance to the United States, and a traitorous intent, would warrant the submission of the case

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circumstances. If the American army are advancing and the Huns are retreating, and I say, 'We cannot always hope to win,' that is pessimistic. If the Huns are advancing, and the Americans are retreating, and I say, 'We cannot always hope to win,' that is optimistic. In order for the government to prove the crime, the government must give color to the words. One cannot look at these words uttered by the defendant, and say that they necessarily favor the cause of Germany. Some of the sentences would not convey that meaning at all, without intent being shown."

to the jury" (Pet. II Br., p. 5). As thus stated, the test assumes the very point at issue, since only by first determining what is a legally sufficient overt act can one determine whether the evidence warrants the submission of the case to the jury. The new test must presumably be read in the light of the petitioner's further contention that each of the acts here charged is insufficient as an overt act of treason because "it is not charged nor did the proofs establish that petitioner in fact gave any aid and comfort to the enemy", and that "as in the case of levying war, so in the case of adhering to enemies, mere preliminaries, such as attempts and conspiracies will not suffice" (Pet. II Br., p. 39).

The petitioner's new definition finds little support, and much opposition, in the English authorities on the law of treason prior to the adoption of the Constitution of the United States. The petitioner, however, discounts the English authorities in large part, on the theory that the constitutional definition adopted in the United States "created an entirely new pattern, which was never intended to include mere attempts or abortive conspiracies" (*ibid.*) And even assuming the relevance of the English authorities, the petitioner contends that the particular acts charged and proved here are still insufficient.

There is no easy answer to the question how far English doctrines of the law of treason

were intended to be incorporated into our constitutional definition, and the precise scope of the English law of treason by adhering to enemies is difficult to ascertain—being beclouded by loose language and often obscured by confusion with other types of treason with which we have no direct concern. Yet there is no conceivable doubt that the law of treason in the United States, both as embodied in the Constitution and as administered thereunder, has been profoundly influenced not only by English statute law—starting with the famous Statute of 25 Edw. III—but by the gloss placed on statute law by English judges and commentators such as Coke, Hale, Foster and Blackstone. Understanding of treason in America must begin—though it need not necessarily end—with a study of treason in England.

Accordingly, under Point I of our brief, which treats generally the nature of the crime of treason and the interrelationship of its elements to each other, we deal first with the law of treason as developed in England down to the latter part of the 18th century. Next we survey the American materials from the earliest times down to and including the adoption and ratification of the Constitution. In the light of the historical background thus developed, we review the construction which has been accorded by the courts to treason under the Constitution of the United States. Under Point II, we present our reasons for be-

lieving that the particular overt acts charged in this case satisfied the constitutional requirements developed under Point I, both as to intrinsic legal sufficiency and as to sufficiency of proof.

I

THE NATURE AND ELEMENTS OF THE CRIME OF TREASON AND THE SIGNIFICANCE OF THE TWO-WITNESS REQUIREMENT

A. *Treason in England down to 1800*

As reference to the early treatise writers shows,[6] the crime of treason under the English common law acquired at least some of its inspiration from the Roman *crimen laesae majestatis*. However, the divergence of the growths of the common law and civil law systems dulls the force of parallels between the two, and comparison thus serves chiefly to illustrate the different means by which different legal civilizations have sought to deal with the problem of the loyalty of the individual to the state and its rulers. For this purpose we set forth in Appendix A a short study of the crime of high treason under the civil law from the time of the Romans down to the modern European codes.[7]

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[6] See Appendix B, pp. 59, 61.

[7] Appendix A, Parts I and II. The primary significance of the study for our purposes lies in its clear showing of the importance which the modern European codes attach as a matter of policy to a broad, preventive attitude toward trafficking with foreign agents.

Study of treason under the common law begins, for all practical purposes, with the Statute of 25 Edw. III, than which, according to Coke, "except it be *Magna Charta*, no other Act of Parliament hath had more honour given unto it."[8] Modern judgment of the statute in operation has been less kindly,[9] but even modern critics have not called into the question the statute's profound effect upon the history of treason over the ensuing centuries.[10] Uncertain as its application may have been, and inadequate as its scope may have appeared in times of political turmoil, it is yet a legislative landmark—and the only one—which has stood in the field of treason for 600 years.[11] Its persisting influence in America in the 18th century is clearly revealed by the debates on the treason clause in the Constitutional Convention, as well as by the form of the typical basic treason statutes adopted in colonial and revolutionary times.

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[8] Coke, *Institutes of the Laws of England, Third Part* (5th ed. London, 1671), 2; Appendix B, p. 56.

[9] "The general effect of the whole is that the statute which has been so much praised, is really a crude, clumsy performance, which has raised as many questions as it can have settled, and which has been successful only when it was not required to be put in force." 2 Stephen 283; Appendix B, p. 132.

[10] See Appendix B, pp. 106, 116.

[11] See 2 Stephen 262–263; *cf. id.* 251; Appendix B, pp. 117–119, 132–133.

To comment upon the importance of the Statute of 25 Edw. III, however, is far from explaining just wherein its importance lay. Upon its face it resolved uncertainties of the common law, purporting to limit to seven those classes of treasons which might be so adjudged without prior resort to Parliament. In this sense, it was clearly restrictive, and its narrowness of scope is emphasized by the readiness with which additional treasons were created by Parliament in times of foreign wars and domestic tension. But the question remains how far within the framework of the seven accepted treasons a further restrictive policy is evidenced limiting the kinds of conduct which may be found treasonable, and the manner in which they may be proved. For four of the treasons—violating the king's companion, counterfeiting the king's privy seal, counterfeiting the king's money, or slaying the king's chancellor or one of his justices—their relative preciseness of definition may have made the answer easy; at least they need not concern us here. For us it is important only to interpret the Statute of 25 Edw. III as it relates to the three major treasons—compassing or imagining the death of the king; levying war against him, and adhering to his enemies, giving them aid and comfort. The meaning of these three treasons must be sought in the cases and in the analyses of the learned text-writers.

In the practical application of the statute, predominant over all the others was, of course, the treason of compassing or imagining the death of the king. Few cases may be found dealing exclusively with either the treason of levying war or that of adhering to enemies.[12] But from this it cannot be assumed that the latter two species of treason did not retain substantial independent significance,[13] nor that analogies from the treason of compassing may not be of assistance in their interpretation. The essential similarity in the elements of proof required under the three branches is affirmed by the frequency with which the same conduct was charged as treasonable under more than one branch in the same indictment.[14]

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[12] *Cf.* the comment of Stephen, referring to the treason of adhering: "Instances of this offence have been very rare in our history. England, owing to its insular position, has not for centuries been the scene of war carried on with a foreign enemy. * * * Hence the offence of 'adhering to the king's enemies'—an exceedingly vague expression—has been committed only by a few spies who have in the time of war been detected in giving information to foreign enemies. * * * No questions of legal or constitutional interest have arisen on this branch of the act of Edward III to my knowledge." 2 Stephen 282; Appendix B, p. 111, note 77.

[13] This statement is subject to the qualification that by the 19th century, at least, the charge of treason by levying war seems to have fallen into disuse.

[14] *Cf.* the suggestion of Foster, Appendix B, p. 98, that conduct which in wartime would amount to "adhering" must for the safety of the state be comprehended within "compassing" if no formal state of war had been declared.

In the earlier centuries of the Statute of 25 Edw. III only rare cases are reported in sufficient detail to be helpful, and, indeed, on the treason of adhering to enemies no fully reported case may be found prior to *Lord Preston's Case* in 1691.[15] Even the early commentators concerned themselves primarily with the treason of compassing or imagining the death of the king. The earliest of the commentators on the Statute, such as Staundford, concerned themselves little with acute analysis of the Statute, or with the nature of its restrictive policy, and not at all with the distinct treason of adhering. In Coke, however, there begins to emerge an emphasis upon a restrictive construction of the statute as a protection against abuse of treason charges as a weapon in domestic factionalism. Even Coke's suggestion of the need for a strict construction of the treason of adhering reflects the same concern—a concern that "adhering to enemies" shall not be extended by construction[16] to include adherence to domestic rebels, even those who have flown abroad.

From the time of Coke on this emphasis prevails. It is reflected not only explicitly, in such

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[15] 12 How. St. Tr. 645 (1691). A charge of treason by adhering to enemies was included in the indictment in *Throckmorton's Case*, 1 How. St. Tr. 869 (1554), but it does not appear from the report that the adhering charge was pressed to the jury.

[16] Appendix B, p. 58.

writers as Hale in 18th century England, but also in the preoccupation of English text-writers and judges with the need for a showing that treasonable beliefs and opinions have in some manner and to some extent been put into action.[12] The question of the nature of the statute's restrictive policy thus merges into the question of the nature of the overt act required to support a charge of treason.

Again, the writers before Coke are of little assistance in determining the nature of the required overt act. There may have been at first some doubt as to the need of an overt act in the offense of compassing or imagining the death of the king.[13] Nevertheless, even in the earliest writers the concept begins to appear of an overt act as important not so much as evidence of intent, but as an element of the crime—a step putting in train a course of action tending towards

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[12] Appendix B, pp. 55–59, 73–76, 88–89, 102, 106, 116.

[13] A strict reading of the Statute of Edw. III would support the view that the requirement—"and thereto be proveably attainted of open deed by people of their condition"—applied only to the offenses of levying war and adhering. Coke, however, held that the overt act requirement applied to each of the three main branches of the crime (Appendix B, p. 85), and his view has been so consistently followed that it may now be considered beyond question. By the time of *Vaughn's Case* (1696), L. C. J. Treby could even express a doubt whether the requirement of an allegation of an overt act was not confined to indictments for treason by compassing. See 13 How. St. Tr. 485, 498.

the forbidden result. Unfortunately, even as early as Staundford there is found the ambiguity of analysis and expression which has pursued the crime of treason even down to the present day. His reference to an act as necessary "*a signifier le dit compassement ou imagination*," leaves ambiguous, to just the same extent as the more modern "manifest", whether the act must show the compassing in the sense of itself making clear the treasonable intent, or only in the sense of translating the intent into the world of action by something done towards its execution.[19] And what value his comments might have is further limited by the fact that they are confined to the treason of compassing.

In Appendix B, at pp. 54 *et seq.*, we set forth all that an extensive search has been able to draw from the leading English text-writers as to the function of the overt act in the proof of treason. Of them, generally, it may be said that for the most part their attention was seldom clearly focused on the need for defining the precise function of the overt act. Moreover, their primary concentration on treason by compassing inevitably tends to weaken their value as guides to the construction of a constitutional provision from which that branch of treason is omitted. Nevertheless, the reliance placed upon these writers both during

[19] Appendix B, pp. 65, 76, 92, 103; but cf. 94.

and after the formulation of the Constitution justifies an attempt to state conclusions which we believe are sustained by a fair reading of them as a whole. The principal of these conclusions is that, in spite of continuing ambiguities finding their root in Staundford, the overt act for no one of the branches of treason is required to "manifest" the treasonable intent except in the sense of showing that the treasonable intent, proved by whatever evidence is available, has moved from the stage of thought or belief into that of action. In other words, the overt act is a distinct element of the crime, rather than merely a prescribed means of establishing the intent.[20]

That there are ambiguities of language is clear. Thus, Coke may be cited on either side of the question.[21] The familiar confusion engendered by the use of such words as "a signifier," "manifest," and the like, has already been noted. Similarly, his discussion of the sufficiency of words as an overt act leaves doubt whether his disapproval rests upon their inherent unreliability in the memory of witnesses, or upon their failure ordinarily to reflect a sufficient advance to the stage of action.[22]

Nevertheless, there are substantial indications throughout Coke, Hale, Kelyng, Hawkins, Foster and Blackstone that the overt act was regarded

[20] See, especially, Foster, Appendix B, pp. 93–95.
[21] Appendix B, pp. 65, 69.
[22] Appendix B, pp. 66–68.

as a distinct element of the crime, carrying t
treasonable design into the realm of action, rath
than as a prescribed means of proving the tre
sonable nature of the design. One indication
the negative one—that no commentator has u
equivocally stated so sharp a limitation on t
character of overt acts sufficient to establish tre
son. And such cases as *Crohagan's Case*,[23] and t
text book discussions thereof, strongly indicate tha
the overt act may be "indifferent" in itself, bu
sufficient if linked by evidence to the design as
step in effectuation thereof. Crohagan wa
proved to have said: "I will kill the king if
may come unto him," and thereafter to have com
into England. Of the case, in which the defend
ant was convicted, Hale said:

> yet it is observable, that there was some
> what of an overt-act joined with it, namely
> his coming into *England*, whereby it seems
> to be within the former consideration,
> namely, tho the coming into *England*
> was an act indifferent in itself, as to the
> point of treason; yet it being laid in the
> indictment, that he came to that purpose,
> and that in a great measure expounded to
> be so by his minatory words, the words
> coupled with the act of coming over make
> his coming over to be probably for that
> purpose, and accordingly applicable to that
> end.[24]

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[23] Cro. Car. 232 (1634).

[24] Appendix B, pp. 79–80.

Foster is even more explicit in his treatment of *Crohagan's Case*.

> In this case the words, though laid in the indictment as one of the overt acts, could not be so properly deemed an overt act of treason, as an evidence against the man out of his own mouth, QUO ANIMO *he came into* England. The traiterous intention, proved by his words, converted an action, innocent in itself, into an overt act of treason.[25]

Foster, indeed, is the clearest and most precise of all the English commentators prior to the American Revolution. He is the first clearly to recognize the need for painstaking analysis of the function of the overt act in the crime of treason, and to state the rule without resort to the earlier ambiguous terminology. His statement is not so much a formulation of a new principle, as it is a restatement of old principles inherent in the views of his predecessors but never carefully enough articulated to avert confusion. He is specific; criticizing Kelyng's treatment of *Crohagan's Case*, he says:

> His Lordship reasoneth in this passage as if he considered the overt acts, required by the statute, merely as *matters of evidence*, tending to discover the imaginations of the heart. Overt acts undoubtedly do discover the man's intentions; but, I conceive, they are not to be considered merely as evidence,

[25] Appendix B, pp. 93–94.

> but as *the means made use of to effectuate the purposes of the heart.*[26]

Again, discussing generally the treason of compassing, he says:

> The words of the statute descriptive of the offence must be strictly pursued in every indictment for this species of treason. It must charge, that the defendant did traitorously *compass and imagine &c.* and then go on and charge the several overt acts as the means employed by the defendant for executing his traitorous purposes. For the compassing is considered as the treason, the overt acts as the means made use of to effectuate the intentions and imaginations of the heart: * * *.[27]

Foster's discussion of the sufficiency of spoken or written words as overt acts further illuminates the principle. Earlier writers besides Coke had failed to analyze clearly the basis of objection to resting a charge of treason upon words alone, leaving doubt whether they were regarded as insufficient proof of intent because of unreliability, or insufficient translation of thought into action. Foster clarifies the point, making clear that words which by themselves would be insufficient as overt acts may be made sufficient by proof *aliunde* that they were uttered as means to effectuate a treasonable intent. Thus he says:

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[26] Appendix B, p. 94.

[27] Appendix B, pp. 89–90.

> In the cases cited by *Coke* there were plain flagitious attempts upon the lives of the parties marked out for destruction: and though in the case of the King overt acts of less malignity, and having a more remote tendency to his destruction, are with great propriety, deemed treasonable; yet still they are considered as *means to effectuate*, not barely *as evidence* of the treasonable purpose. Upon this principle words of advice or encouragement, and, above all, consultations for destroying the King, very properly come under the notion of *means made use of* for that purpose. But loose words not relative to facts are, at the worst, no more than bare indications of the malignity of the heart.[28]

And the same principle appears to underly his view that a meeting of several persons, when coupled with evidence that their intention in meeting was to plot treason, is a sufficient overt act.[29]

It may be said that all views quoted or mentioned above have been expressed with relation to the treason of compassing or imagining the death of the King, rather than to the treason of adhering. It is true that, by and large, text book discussions have been directed at compassing, the branch of treason under which, doubtless because prosecutors found it of greater breadth and convenience, the vast majority of

[28] Appendix B, pp. 94–95.
[29] Appendix B, p. 95.

treason indictments were brought. But a fair reading of the treatise writers negates the thought that the doctrines they advanced regarding the independence of the overt act as an element of the crime applied peculiarly to treason by compassing, and not to treason by levying war or adhering to enemies. Again, the negative implication of the materials is persuasive; to the extent that levying war and adhering are discussed, the discussions fail to hint that a different standard would be applied to the sufficiency of overt acts in those areas.[30] Indeed, it was to treason by adhering to enemies that the new overt act requirement of the Statute of 25 Edw.

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[30] It should be noted that from as early as Coke down to the end of the 18th century it was held that at least an assemblage in force was a prerequisite to treason by levying war, and that a conspiracy to levy war would not of itself suffice. Early analyses, however, laid this requirement to the fact that the statute itself "saith levy guerre." See Appendix B, p. 82. Since the creation of treasons by construction and rationalization was not ordinarily inhibited by such mechanical factors, the limitation may well be taken as stemming from the general policy objection to abusing the statute in domestic controversy. So viewed, the limitation takes on the character of a restriction on the field of operation of the statutory prohibition, rather than a qualification as to the type of overt act which would be sufficient once it is established that war has been levied. Marshall's approach in the *Burr* case, treated *infra*, pp. 58–59, is consistent with this analysis. On the other hand, it has been suggested that the limitation stems from the reluctance of feudal lords to surrender their rights in the mutuality of the bond between lord and vassal. 2 Pollock & Maitland 508; 8 Holdsworth 331; Appendix B, II, 2, note 60.

III most unequivocally applied; so that Coke, taking the firm position that notwithstanding the language of the statute overt acts were required for compassing as well as for adhering,[31] resorted to the common law requirement of "some open deed tending to the execution of his intent," as an analogy to support his contention, since the statute "is for the most part Declaratory of the Ancient Law." Neither he nor any subsequent writer suggests any different quality in the overt act required for the two offenses. Foster, again, is the clearest; after reciting that "purposing to go thither to that end [i. e., to a foreign country to incite an invasion] *and taking any steps in order thereto*" is an overt act of treason by compassing, he indicates that for the protection of the state it must be so held because unless the foreign country in question is "actually at war with us" the head of treason by adhering would by its own terms be inapplicable.[32] In Foster's view, it would seem, treason by compassing, at least when involving foreign powers, differs from treason by adhering only in being punishable in the absence of a formal state of war.

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[31] He fails to mention the requirement with respect to levying war, apparently supposing that the actual levying of war, which he held would be necessary, would involve such obvious overt acts of treason as to make discussion unnecessary. See Appendix B, p. 98.

[32] Appendix B, pp. 97–98.

Nor do policy considerations dictate the application of a stricter rule to treason by adhering than to treason by compassing. We have noted (*supra*, p. 20) a reluctance in Coke to see the concept of levying war extended by construction to include domestic controversies. The prevailing doctrine denying the sufficiency of a conspiracy to levy war as an overt act of treason by levying war may stem from the same reluctance (see footnote 30, *supra*). However that may be, we have found no indication that the restrictive policy in the enforcement of the treason statute carries over to treason by adherence to foreign enemies during the existence of a formal state of war. Foster's exposition tends to the contrary:

> The offence of inciting foreigners to invade the kingdom is a treason of signal enormity. In the lowest estimation of things and in all possible events, it is an attempt, on the part of the offender, to render his country the seat of blood and desolation; and yet, unless the powers so incited happen to be actually at war with us at the time of such incitement, the offence will not fall within any branch of the statute of treasons; except that of compassing the King's death: and therefore, since it hath a manifest tendency to endanger the person of the King, it hath, in strict conformity to the statute, and to every principle of substantial political justice, been brought within that species of

treason of compassing the King's death; * * *[22]

And his view is made more specific when he treats incompleted efforts at aid and comfort as being sufficient overt acts for treason by adhering as well as treason by compassing:

> though the money of intelligence should happen to be intercepted: for the party in sending did all he could; the treason was complete *on his part, though it had not the effect he intended.* [citing cases]
> The cases cited * * * did not in truth turn singly upon the rule here laid down, though I think the rule may very well be supported. For *Gregg* was indicted for *compassing the death* of the Queen, and also *for adhering to her* enemies; and *Hensey's* indictment was in the same form, and so was Lord *Preston's* * * *; and the writing and sending the letters of intelligence, which, in the cases of *Gregg* and *Hensey, were stopped at the post-office*, was laid as an overt act of both the species of treason: so that admitting for argument's sake, which is by no means admitted, that it was not an overt act of *adhering*, since the letters never came to the enemy's hands and consequently no *aid or comfort* was actually given, yet the bare writing and sending them to the post-office, in order to be delivered to the enemy, was undoubtedly an overt act of the other species of treason. In *Gregg's* case the

[22] Appendix B, p. 98.

judges did resolve, that it was an overt act of both the species of treason charged on him; and in *Hensey's* the court adopted that opinion and cited it with approbation."

That the rule thus stated by Foster is supported by the English cases is conceded by the petitioner in his new brief (Pet. II Br., pp. 10–12). For this reason we do not here burden the Court with an extensive analysis of the cases, although for the Court's information we set forth in Appendix B, at pp. 133 et seq., a short study of the more important cases which have had a function in shaping the law of treason in England. As there indicated, the cases more than the treatises fall short of clear exposition of the relevant principles. Many of the reports, while extensive, are largely consumed by the record of proceedings, testimony, and factual argument. Statements of pertinent legal principle often to be found in the addresses of counsel must be discounted for partisanship; and even the rulings and charges of eminent judges, rendered as they are in the heat and speed of first instance trials in times of great political tension, are entitled to less weight than would be the case with rulings by the same judges on questions of law upon appeal. Our study has led us to the conclusion that the cases are of principal value as precedents when screened by the analysis

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[34] Appendix B, pp. 99–100.

of the treatise writers—many of whom were themselves judges of distinction. And this is the more true in the context of the present case, where the problem is to determine the doctrines which influence American statesmen and jurists in the framing and administration of the American treason provision: for while the influence of English precedents in this country is plain, the evidence is that that influence derived not from first-hand knowledge of the English cases themselves, but from the treatise writers by whom they were analyzed.

Before turning to the developments of American thought on the law of treason, we summarize what we conceive to be the most significant conclusions to be drawn from our study of the English law:

1. The overt act required in proof of treason by adhering to the enemy is, with only specialized exceptions, of the same character and quality as the overt act required in proof of treason by compassing.

2. The overt act is a distinct element of the crime, separate from the element of intent.

3. Both the overt act element and the intent element must be proved by sufficient competent evidence, which need not be, and usually is not, the same in both cases.

4. Assuming establishment of the treasonable intent, the crime of treason is made out when it

is shown that the accused performed an act which is related by adequate evidence to the intent, and which makes the intent operative in action.

5. The fact that the act made the intent operative in action need not appear from the face of the act; the act, taken by itself, and without connecting evidence, may appear to be "indifferent" or harmless.

6. The legal sufficiency of the act of adherence does not depend upon whether it successfully accomplished the intent to give aid and comfort.[38]

B. *Treason in America down to the Constitution*

(1) *The Colonial Period.*—We have mentioned above the persisting influence of the Statute of Edw. III upon the formulation of the American constitutional definition of treason. Primarily, American thought on the subject of treason in the period preceding the Constitution derived from English law, as glossed by English judges and text writers, with local modifications arising naturally out of the tensions and exigencies of the Revolution.[1] Little may be found in the legal and political history of the colonial period in America to cast light on the precise meaning of

[38] Cf. L. C. J. Treby in *Vaughan's Case*, 13 How. St. Tr. 485, 533 (1696), discussing acts of treason by adherence: "And after this kind of reasoning they will not be guilty, till they have success; and if they have success enough, it will be too late to question them."

the constitutional definition. Nevertheless, we have thought it proper in the interests of completeness to search the colonial as well as the Revolutionary and immediately pre-constitutional periods for possible relevant materials. The results of the search made at our request are set out in Appendix B, Part II, I. We summarize them here.

Generally speaking, the early colonial charters and proprietary grants conferred broad authority to deal with offenses against the integrity and stability of government. The terms of these grants were sufficiently comprehensive to include measures designed to cope with what might fairly be thought of as treason, although without limitation to that offense, and without use of the familiar English words of art which might suggest primary concern with that particular offense. Some of the earliest legislative actions taken under these grants, particularly in the northern colonies, were likewise free of traditional language in their definitions of offenses deemed dangerous to the government. However, taking the colonial period as a whole, the evidence is clear that for the most part the definition of the offense of treason was thought of in terms of English legislation, and particularly in terms of the Statute of 25 Edw. III. This was true even in the later legislation of the northern colonies, which had earlier adopted more generalized measures for the pro-

tection of the state. In some colonies, such as Connecticut, Massachusetts and New Hampshire, the observance of English models took the form of substantial copying of the language of the Statute of 25 Edw. III. In others, such as Delaware, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and possibly Virginia, reliance upon English law was reflected by declarations, in varying terms, that the offense of treason should be as defined, proceeded against and punished under the laws of England. Only Georgia and New Jersey failed to adopt at some time treason legislation thus based upon English models. A treason act in Maryland, based upon the language of the Statute of 25 Edw. III, was permitted to expire without reenactment because of a belief that the criminal laws of England extended by their own force to the province.

The legislation of the colonies thus reflects thorough awareness of the English law of treason—an awareness not infrequently heightened by action of the government in England invalidating some colonial statute as inconsistent with, or unnecessary by virtue of, the Statute of 25 Edw. III. The extent of detailed knowledge of the application of English treason law in particular situations is, however, open to more question. Reported treason cases are rare. Only one case prior to the Revolution is preserved in sufficient detail to be of value—*King* v. *Bayard*, 14 How. St. Tr. 471 (1702). The record in this case shows famili-

arity on the part of counsel with English law as analyzed and construed by Coke, and a readiness to apply the analogy of that law even under a New York statute which in its terms bore little resemblance to familiar English precedents. Neither from this case, nor from any other case materials, is it possible to deduce the growth in pre-revolutionary days of any indigenious American common law of treason.

The definition of treason in the Constitution of the United States is restrictive, in that it confines to two the offenses which may be dealt with as treason, without leaving even to the legislature the freedom preserved by the Statute of 25 Edw. III to add to the definition. The colonial period, however, reflects no premonition of this restrictive policy. The legislative emphasis is almost wholly upon protection of the safety of the state—a concern natural enough in any developing and remote territory always subject to grave danger from external enemies. Whatever the cause, there is no evidence prior to the Revolution of a mistrust of the broad constructions accorded to the treason statute under English law. Many of the colonies specifically carried over the crime of compassing or imagining the death of the king; Maryland and Pennsylvania went even further, in extending the crime to cover compassing or imagining the death of the proprietor—a course which in the case of Pennsylvania incurred the displeasure of the English authorities as presumptuous. As

had been the case in England, times of peculiar stress, such as the French and Indian wars, or domestic upheavels either in America or England, produced additional legislation either expanding the definition of treason or punishing new offenses with comparable severity.[20] Many of the colonies provided specifically by statute against those forms of domestic insurrection which had been brought by English judges within the scope of treason by "constructive levying of war."[21] In some cases conspiracy to levy war, which in England had early been excluded from the treason of "levying war" (although it was later brought within treason by compassing), was specifically included. The evidence will not sustain the thought that such enactments as these reflected any self-conscious intent to import in detail the extensive gloss which had

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[20] Most of this legislation antedated 1700, however, cf. charges to the Grand Jury in 1765 and 1766 by the Chief Justice of the Province of Massachusetts Bay: "Levying War against the King is High Treason: as where People set about redressing public Wrongs: this, Gentlemen, the Law calls levying War against the King; because it is going in direct Opposition to the King's Authority, who is the Redresser of all Wrongs." Op. cit. Appendix B, II, 1, note 21.

[21] Some of this special legislation, described in detail in Appendix B, II, 1, is of particular interest because of the types of conduct, in the nature of adhering to the enemy, which it proscribes, and also because of the creation of exemptions based upon the absence of treasonable purpose. The exemptions tend to support at least a tenuous inference that the overt act was regarded as a separate element of the crime, distinct from the intent element.

been placed upon the law of treason in England; but it is likewise inconsistent with any suggestion of mistrust of English treason law in the colonial days. As reflected in Delaware and Pennsylvania statutes, the English law of treason was regarded as within the "birthright of English subjects."

If the colonial legislation thus shows an almost unbroken tendency to put the interest in community security first in defining the types of conduct which shall be deemed treasonable, it is equally true, however, that it displays a consistent regard for the types of procedural safeguards which had grown up under English law. Certain early statutes required at least two witnesses to prove any capital offense. From the latter part of the 17th century on, in most of the colonies the two-witness requirement and the procedural guarantees laid down by the Statute of 7 William III in treason trials were expressly enacted by reference to that statute or to the English statutes on treason generally.[38] The witness requirement of course meant simply a requirement of two witnesses without the specification laid down subsequently in the United States Constitution, that they be to the same overt act. On the other hand, pursuant to the Statute of William III, they must be witnesses to the same treasonable offense, and one witness

[38] See Appendix B, II, 1, note 26.

to each of two separate treasons, or at least two different types of treason, would not suffice.

The foregoing summary will show that, from our point of view, the legal and political history of the colonial period in America is of relatively little assistance except in the aspect of showing the attitude in the colonies towards English models, and the prevailing reliance thereon. We have found no recorded cases which would throw light on the nature of the overt act required in treason by adhering to enemies. Moreover, there is little in colonial history in the way of abuses of treason legislation which might foreshadow or explain the extent of the limiting intention of the framers of the constitutional definition. If, as the petitioner argues (Pet. II Br., p. 39), "the constitutional definition created an entirely new pattern", neither the shape of that new pattern, nor the reasons for its adoption, can be found in the colonial period.

(2) *The Revolution.*—It is in the revolutionary period that we encounter the first hint of departure from the English law of treason. As that period created new enemies to fear, and new allegiances to support, so also it furnished political reasons for opposing broad constructions of the English law adopted to cope with the rebelling colonists. As early as 1774 Jefferson had protested the proclamation of General Gage in Massachusetts declaring it treason for the inhabitants to assemble or to form associations for the

purpose of considering grievances. His protest took the following form:

> If he considers himself as acting in the character of his Majesty's representative, we would remind him that the statute 25th, Edward the Third has expressed and defined all treasonable offences, and that the legislature of Great Britain had declared, that no offence shall be construed to be treason, but such as is pointed out by that statute, and that this was done to take out of the hands of tyrannical Kings, and of weak and wicked Ministers, that deadly weapon, which constructive treason had furnished them with, and which had drawn the blood of the best and honestest men in the kingdom. * * *[39]

The objection ran to other matters than the substance of the crime; for example, both the Declaration of Independence and the earlier Resolutions of the Continental Congress (1774)[40] reflect apprehension of the growing threat of transporting colonists to England for trial for treason and other offenses.

The first articulate thinking on the need for a restrictive construction of the law of treason thus comes from Jefferson, or at least from materials in which he had a hand. He was a member of the Committee on Spies which recommended to the Continental Congress that the several colonies

[39] Appendix B, II, 1, note 26.
[40] Appendix B, II, 1, note 37.

adopt uniform treason legislation framed in the familiar terms of the Statute of Edw. III, but with omission of the treason of compassing. The omission may well have arisen from the simple fact that the colonists no longer recognized a king whose death could be compassed or imagined; or it may have stemmed at least in part from a more self-conscious desire to eliminate abuses the dangers of which were naturally becoming increasingly perceptible to men who by their own conduct were opposing an established government. Whether or not the form of the recommendation was shaped by any such self-conscious intention, the thought was clearly in Jefferson's mind. His protest to General Gage had already reflected his concern with treasons imposed at the hands "of tyrannical Kings, and of weak and wicked Ministers"; a similar concern with the constructive extension of treason by judges—foreshadowing the ultimate constitutional provision—appears in his notes to his draft of a proposed Virginia treason statute which he transmitted to Chancellor Wythe in 1778. See Appendix B, II, 1, note 41. A similar precautionary note appears in the arguments of James Wilson as defense counsel in the Pennsylvania treason trials.[a] His ar-

[a] These trials were under the Pennsylvania statute of 1777 quoted by the petitioner in his second brief (Pet. II Br., pp. 25-27). They are of particular interest in that, like the earlier case of *King* v. *Bayard* (*supra*, p. 36), they illustrate the tendency of American lawyers to rely upon English treason precedents even in trials under a statute

ments, as scantily recorded by the chief justice at the trials, reflect a new appreciation, not apparent in colonial days, of the Statute of Edw. III as a restriction on the powers of government and a protection of the rights of the individual. His views, like those of Jefferson, deserve weight because of his participation in the formation of the outlines of the new government.

However, the restrictive point of view advanced by Jefferson found little reflection in legislation by the states prior to 1790. True, following the recommendation of the Continental Congress, most of them adopted treason statutes which omitted treason by compassing; but their continued dependence on English models in other respects is clear. Several of the state statutes of the revolutionary period provided specifically or by implication for construction by the standards applied under the Statute of Edw. III; none of them followed the restrictive approach recommended by Jefferson in 1778. And, as in periods of particular stress in colonial times (see p. 38, *supra*), special statutes abounded which itemized particular types of conduct, in the nature of adhering to the enemy, which were deemed treasonable or at least worthy of comparable punishment. Though the crime of treason by compassing was gone, almost half the states revived the old crime

bearing very little resemblance to the Statute of Edward III. The cases are the first in America containing any particular discussion of the significance of the overt act element in the crime. See Appendix B, II, 1, note 35.

of conspiracy to levy war—in England comprehended only within treason by compassing; other statutes added what in effect were offenses of conspiring to adhere to the enemy, giving him aid and comfort.[42] Under many of the statutes it was arguable, and in others clear, that the offense lay in engaging in particular proscribed conduct, regardless of specific treasonable intent. Over all, the safety of the state was paramount, with little preoccupation with the protection of individual rights. Such procedural safeguards as appeared followed familiar models, such as the Statute of 7 William III, with no premonitory hint of the type of two-witness requirement later inserted in the Constitution.

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[42] See Appendix B, II, 1, notes 47–76. The Pennsylvania statute referred to in the preceding footnote affords an example; among other things it declared guilty of high treason anyone who should "form, or be anywise concerned in forming any combination, plot or conspiracy for betraying this state or the United States of America into the hands or power of any foreign enemy." The petitioner, much relying on this statute, chooses to treat its itemization of treasonable conduct as representing types of actions which would be clearly sufficient as overt acts under the constitutional definition (7 Pet. II Br., p. 27); from which it would appear to follow that a conspiracy to adhere to the enemy was regarded as constituting treason by adherence. It should be noted, however, that the Pennsylvania statute, while paralleled in Connecticut, North Carolina, and Vermont, was of a minority type, not representative of treason legislation in the revolutionary period as a whole. See Appendix B, II, 1, note 62.

(3) *The Adoption of the Constitution.*—Revolutionary as well as colonial experience thus offers little to explain the precise scope of the substantive restriction imposed upon treason by the constitutional definition. There is no indication that grievances over oppressive prosecutions for treason or any other offense were among the causes which brought the Federal Convention together in 1787. Nor do the first stirrings of the new Constitution disclose any leaning toward restriction. In 1786 a committee of the Continental Congress, reporting proposals for amendments to strengthen the Articles of Confederation, included among them a suggestion that Congress should have the sole and exclusive power to define and punish treason, without hint of limitation upon the federal legislative power. A similar proposal found its way into the "Pinckney plan" for the new government which was presented to the Convention at its opening. Hamilton's proposed plan of government provided merely, as to treason, a limitation on the pardoning power.[7]

The actual process of formulation of the final constitutional definition, so far as that process can now be reconstructed, is hardly more revealing. In our first brief, we described the debate in the Committee of the Whole in so far as it

[7] Appendix B, II, 1, notes 77–81.

related to the two-witness requirement (I Br., pp. 37–38). The study in Appendix B, II, 1, (c), outlines in greater detail the process by which the final treason clause was produced.

The nucleus of the ultimate treason definition came from the Convention's Committee of Detail. This committee had set to work under a general instruction to devise means enabling the national legislature "to legislate in all cases to which the separate States are incompetent", but with no specified authority to deal with the subject of treason. It presumably had before it the various proposals already mentioned, none of which reflected any fear of the exercise of national power in the field. It may also have had before it the suggestion contained in a draft of the "New Jersey Resolutions", advanced on behalf of the small states, that the Constitution should define what offenses committed in the states should be deemed treason against the United States. Though this suggestion did not remain in the "New Jersey Resolutions" in their final form, the materiality of its implications is reflected in the lengthy discussion in the Convention of the relative boundaries of federal and state definitions of treason. It is at least consistent with the evidence to suppose that the first and paramount pressure for limitation of the definition of treason in the federal Constitution arose from a growing fear that the strengthened federal government might seek to dominate the separate states through

abuse of treason prosecutions in what were essentially domestic political controversies. The states themselves, since their dissociation from England, had freely preserved and developed English models for coping with treasonable activities, and, as we have seen, their political and legislative history reflected no qualms at the use of treason statutes to preserve governmental stability. They had shown themselves ready to re-establish legislatively aspects of treason which had by dialectical reasoning of the English judges and commentators been brought within treason by compassing or imagining the death of the king; and this readiness in itself argues strongly that their general abandonment of that broad category of treason had been significant more of the absence of a king than of any particularly restrictive policy in the definition of the offense. The fair implication of history is that the substantive restriction of the constitutional provision was designed to limit the federal government as such to control over those areas of treason which involved actual rebellion in force or attack by foreign enemies of the United States, without qualification as to the types of conduct which by previous, including English, historical standards had been regarded as treasonable in these areas.

The actual history of the treason clause in the Convention is consistent with this conclusion. As

it emerged in the draft Constitution reported by the Committee of Detail, it read as follows:

> Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood nor forfeiture, except during the life of the person attainted.

This was the draft which fixed the main outlines of the final provision. It will be seen that with respect to the substantive definition of the offense it followed the familiar model of the Statute of Edward III, varying therefrom primarily in omitting the crime of treason by compassing, as had already been done in the legislation of most of the states. As the evidence fails to suggest that the states by their earlier similar action had sought in any way to restrict the crimes of treason by levying war and by adhering to enemies, a constitutional definition following the state precedents is likewise without implication as to restrictive intent. Procedurally also, the draft accepts standards already tested by experience; a two-witness requirement, unrelated to any particular overt act, had been a commonplace

in colonial and revolutionary legislation. The one truly novel contribution of the draft lies not in these matters, but in the restriction, without precedent either in England or America, upon the power of the federal legislature to expand the definition. The draft impels the implication that in so far as it sought restriction it was designed, not to narrow existing concepts of treason by levying war and adhering to enemies, but to confine the federal legislature to those existing concepts."

The debates in the Convention, except in the respect that their preoccupation with the relative boundaries of federal and state power over treason tends to support this thesis, cast little further light on the question. The underlying assumption of at least many of the members that English precedents in the construction of treason would continue to govern under the Constitution is indicated by the controversy whether to restore the "aid and comfort" phrase of the Statute of Edward III. The circumstances of the restoration of the phrase leave some doubt whether the desire was to restrict or to expand the definition; the fairest inference seems to be that its restoration was regarded as placing the constitutional provision on familiar ground. At least the final motion, upon which the phrase was restored, embodied the view that without

[1] Appendix B, II, 1, note 84.

the phrase; the constitutional definition would be broader than the Statute of Edward III.[45]

It is not entirely surprising that the treason provision, which had occupied relatively little of the time in the Convention, acquired more importance in the debates over ratification of the Constitution by the states. Its prominence in these debates was given to it largely by proponents of the new Constitution, who in a sense regarded themselves as responsible for extolling the new form of government to states highly jealous of their own sovereignty, and fearful of encroachment thereon by a super-government. In such an atmosphere, an article thought of as primarily significant for its limitations upon the power of the federal government became a highly valuable weapon of debate. It is true that James Wilson, who through his participation in the Pennsylvania treason trials if for no other reason had become deeply concerned with the subject of treason, laid much emphasis upon the generally restrictive nature of the definition; but throughout even his praise of the new provision the dominant note is its effectiveness to prevent the federal legislature from misuse of treason charges as a weapon in domestic political strife. The evidence is perhaps not all on one side. Jefferson's unshackled mind had without doubt envisaged a new state in which the rights of the

[45] Appendix B, II: 1, note 86.

citizen should be paramount—although it was suggested that by the time of Burr's acquittal his earlier views had been somewhat modified (see Appendix B, II, 1, note 115). Wilson doubtless looked for a careful restriction of definition of treason in the newly constituted nation. But Wilson's own thoroughgoing familiarity with the British as well as the American precedents argues that, had he contemplated a restriction upon those forms of treason which had traditionally been held to fall within levying war and adhering to enemies under the Statute of Edward III, he would have protested a constitutional provision following the terms of that statute, and would have fought for new and more plainly restrictive language. To Wilson too, it would seem, the merit of the new constitutional provision was not that, in the petitioner's phrase, it "created an entirely new pattern," but that it permanently and definitely confined the federal government to old patterns, whose contours had been fixed over the centuries by a process of interpretation.[46]

The conclusion which we draw from the background of the American constitutional definition of the crime of treason is thus that as to the substance of the offense and the elements required for its establishment the Constitution created no such "entirely new pattern" as the petitioner suggests.

[46] Appendix B, II, 1, notes 90–94.

This is not to deny the existence of a deep-felt fear of abuse of treason, especially by the creation of new "constructive" treasons under the charge of treason by levying war. This fear is clearly implied by the overtones of debate. But the direction and the limits of the fear are well indicated by Madison's comment in *The Federalist*, that "newfangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other." [47] A concern so expressed, in terms themselves drawn in part from Blackstone,[48] hardly points to an intent to reject centuries of English and American experience with those established forms of treason which deal basically with the protection of the state against actual rebellion in force or attack by external enemies. We believe that the record as a whole emphatically negatives any such view.

Thus far, we have discussed the substance of the offense of treason. Procedurally, there is no doubt that the Constitution introduced a pure novelty—the extension of the two-witness requirement to cover each overt act. The specific requirement that conviction rest upon "the Testimony of the two Witnesses to the same overt Act" finds no substantial historical precedent

[47] Appendix B, II, 1, note 95.

[48] Blackstone likewise referred to "newfangled" treasons; see Appendix B, p. 102.

The constitutional materials surrounding its origin are sparse. A general two-witness requirement was familiar; but the linking of this requirement to a single overt act is foreshadowed in none of the earlier recommendations, nor in the draft constitution reported by the Committee of Detail. All that is known appears in the debate of the Committee of the Whole, from which in our first brief we quoted the pertinent passages (I Br., pp. 37–38).

Sometimes the obvious answer to a question of historical research is to be mistrusted merely because it is obvious; but here we believe that the obvious answer is the right one. The change in the two-witness requirement was laid by Dr. Franklin to the need for protection of the innocent against perjury, in view of the notorious fact that "prosecutions for treason were generally virulent." Overt acts of treason had theretofore generally been provable by the testimony of a single witness; where two witnesses had been required each alone might prove a separate act. Under the amendment, what before could be shown by one witness now required two. This is all that we can draw from the fact and circumstances of the amendment, and we believe it fully sufficient to justify the amendment in terms of purpose. Certainly the historical materials furnish too tenuous a thread to sustain the view that the amendment

somehow worked a change in the traditional function of the overt act element in treason.

C. *Treason in America under the Constitution*[49]

If there were doubt from the materials of the constitutional period as to whether the constitutional definition was designed to create "an entirely new pattern" of interpretation, divorced from historical English precedents, that doubt is resolved in the negative by an examination of the American treason cases following 1790. The cases, it is true, are relatively few.[50] But through them runs a strong and consistent thread of dependence upon the law of treason as developed in England under the Statute of 25 Edw. III. With but occasional and inconclusive deviations,[51] American treason opinions have whole-heartedly acknowledged the historical continuity of the crime, and have sought, if not binding authority, at least helpful guidance from the English precedents and even more from the expositions of English commen-

[49] See, generally, Appendix B, II, 2.

[50] In Appendix B, II, 2, note 21, there are collected the citations and brief descriptions of all reported cases disclosed by a diligent search. Disregarding grand jury charges and cases with only incidental involvement of treason, the total number of instances in which the construction of the federal constitutional provision was in issue is but 35; in addition, there have been two reported trials for treason against states, those of Thomas Wilson Dorr (R. I., 1844) and John Brown (Va., 1859).

[51] See Appendix B, II, 2, note 20.

tators.[52] Treason under our federal Constitution is a direct descendant of treason in England.

This is not to suggest that American treason decisions have been controlled by blind adherence to the English materials. Though the initial omission of treason by "compassing" from the stand-

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[52] See cases cited in Appendix B, II, 2, note 21, especially Chief Justice Marshall in *United States* v. *Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55, 159–160:

"* * * It is scarcely conceivable that the term [levying war] was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them, in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edw. III, from which it was borrowed. It is said that this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them; and those opinions are afterwards carried to the bar, the bench and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect."

ard statutory definitions of the revolutionary period and from the Constitution itself does not appear to have sprung from any clear or self-conscious intention to limit the scope of the offense except to the extent that the omission itself indicates,[53] yet the fact of the omission has exerted a strong influence on judges called upon to construe the clauses remaining in the federal provision. For it was in relation to treason by "compassing" that the greatest extravagances had been committed in England; and the omission of the clause, whatever might have been the original purpose in omitting it, served to suggest the need for a cautious and conservative approach to the English authorities. Rejection of them as a whole was, as we have noted, rare; but reservation was not uncommon. Typically, Mr. Justice Iredell found occasion to comment upon the need for careful selection of the "better and more modern decisions", which might be assumed to be the guides which the framers of the Constitution had in mind.[54] Similar reservations may be found in expressions by Marshall, Peters, Chase, and Grier.[55]

The restrictive approach to treason indicated by this early attitude towards the English au-

[53] See pp. 46–49, *supra*; cf., however, Appendix B, II, 1, (c), reflecting an evaluation of the evidence with which we do not agree.

[54] Charge to the jury in the first *Fries* trial; Appendix B, II, 2, Note 25.

[55] Jury charges in the *Burr*, *Fries*, and *Hanway* trials; Appendix B, II, 2, notes 22–26.

thorities has been a marked characteristic of the law of treason in America under the Constitution. We have noted in the preceding section of this brief our belief that the constitutional definition itself grew primarily out of a desire to confine the federal government to established standards, and to enlarge the protection against perjury; but with respect to the substantive aspects of the crime any doubt as to the existence of a restrictive policy of interpretation following the Constitution cannot survive a fair reading of the cases. The cases have reflected not only a policy of avoiding the excesses of English treason law, but a preoccupation with the need for guarantees designed to ensure maximum protection against prosecution for merely unpopular beliefs or for conduct falling short of an actual attempt to give effect to a betrayal of allegiance. The atmospheric condition reflected by the Bill of Rights favored the growth of a body of doctrine opposed to the creation of new treasons by "constructive" levying of war, in the absence of a clear showing of specific intent to subvert the government by force; and though the aim has not always been achieved, the decisions show an earnest effort at precise definition of the offense, in the interest of protecting individual freedom of thought, and averting treason prosecutions merely for the satisfaction of popular hysteria. The restrictive approach thus reflected accords with the spirit of

our Constitution, whether or not required by its terms.

But if it is important to observe the existence of a restrictive policy in interpretation, it is equally—and for purposes of this case more—important to observe the limitations of that restrictive policy. It is a significant fact that the bulk of treason prosecutions have been brought under the head of levying war, and that the restrictive approach has found primary expression with respect to the character of conduct which would constitute that crime. From the Whiskey Rebellion cases in 1795 [8] down to the Civil War the deepest concern of the courts was to ascertain the precise limits of "constructive levying of war", and to state principles which would confine the charge to uprisings in force convened with a deliberate and specific intention to defeat the operations of government with respect to something more than a particular or private object. The confining principles took varying forms. In the *Bollman* [9] case, for instance, Chief Justice Marshall took occasion to reiterate the long established English doctrine that conspiracy to levy war is not treason by levying war—for the reason that war has not been levied. His practical direc-

[8] *United States* v. *Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 37 (Circ. Ct. D. Pa.); *United States* v. *Mitchell*, Fed. Cas. No. 15,788, 26 Fed. Cas. 1277 (Circ. Ct. D. Pa.)

[9] *Ex parte Bollman*, 4 Cranch 75, 126.

tion of a verdict at *Burr's* trial [58] rests upon a comparable principle: though even remote or minute actions by a defendant in aid of a war actually levied by an assemblage in force may be laid against him as overt acts of treason, yet if he was not present at the assemblage and took no part in it, the assemblage itself cannot by "construction" be laid against him as an overt act on his part, however strong the showing of his treasonable intent. By contrast, in numerous cases involving plainly sufficient overt acts of levying war, in the sense of accomplished violent resistance to authority, the decisive factor in favor of the accused has been the inadequacy of any showing of a specific intent directed to the necessary public or general purpose.[59] The latter group of cases reflects essentially an endeavor to distinguish between the offense of treason and the reprehensible but less grave offense of riot; and by the middle of the nineteenth century the line seems to have been drawn with sufficient clarity to preclude further attempts to deal with riots by means of treason prosecutions. The only reported attempt since the Civil War to use the charge of treason by levying war was an abortive indictment under Pennsyl-

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[58] *United States* v. *Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55 (Circ. Ct. D. Va.).

[59] *E. g., United States* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 400, 402 (Circ. Ct. D. Vt.); *United States* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 127 (Circ. Ct. E. D. Pa.).

vania law arising out of the Homestead Riot of 1892.[40]

From the cases on treason by levying war we may thus draw a lesson in careful definition of the crime, so as to exclude mere conspiracies or riots. But we find nothing in them to suggest abandonment of the basic distinction of English treason law between the intent and the overt act as separate elements in the crime, each subject to proof which might, but more generally would not, be the same. The overt act must, it is true, advance the intent so far in execution that it can be said that war is being actually levied, and much of the apparently restrictive language of the cases may be explained by the preoccupation with the necessity of establishing this prerequisite fact; but this is very far from saying that the nature of the overt act must be such as to show on its face that the assemblage is with treasonable intent. The contrary inescapably appears from Marshall's statement in the *Bollman* case (4 Cranch 75, 126), reiterated by him (although not regarded as there controlling) in his charge to the jury in the *Burr* case (25 Fed. Cas. 55, 161), that "if war be actually levied, that is, if a body of men

[40] See Appendix B, II, 2, notes 27, 110–112.

"* * * some actual force or violence must be used in pursuance of such design to levy war; but * * * it is altogether immaterial whether the force used is sufficient to effectuate the object—any force connected with the intention will constitute the crime of levying war." *Case of Fries*, Fed. Cas. No. 5127, 9 Fed. Cas. 924, 931.

be actually assembled, for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minor, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors".

When we come to the cases of treason by adhering to enemies, the story is the same. These cases are fewer in number; prior to 1919, only three such reported cases have been found, all arising out of the War of 1812.[62] The *Lee* case, for instance, brief as is its report, reiterates Marshall's view expressed in the *Burr* trial[63] that evidence of intent may at the election of the prosecution be presented prior to any proof of the overt act charged—a view inconsistent with an understanding that evidence of intent serves merely to corroborate an intent required to appear from the overt act itself. And in *United States* v. *Pryor* the primary concern of Mr. Justice Washington's charge to the jury was whether the separate evi-

[62] *United States* v. *Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C.); *United States* v. *Hodges*, Fed. Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md.); *United States* v. *Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628 (Circ. Ct. D. Pa.). A charge of treason by adhering to enemies was included in the indictment in *United States* v. *Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18 (Circ. Ct., N. D. Cal.), but was withdrawn from consideration of the jury on the ground that adherence to rebels did not constitute adherence to "enemies" within the meaning of the Constitution.

[63] Fed. Cas. No. 14,692b, 25 Fed. Cas. 52, 53–54.

dence of intent was sufficient to establish the treasonable nature of an act which on its face might have been either treasonable or non-treasonable. Moreover, *United States* v. *Pryor* sustains the view of Foster and the English cases (see pp. 31–32, *supra*) that success in accomplishment of a design to give aid and comfort to the enemy is no prerequisite of the crime. Mr. Justice Washington, it is true, distinguished as non-treasonable the act of going in search of provisions to supply the enemy and "stopping short before any thing was effected, and whilst all rested in intention" (27 Fed. Cas. 630). In such a case the design to give aid and comfort to the enemy has been abandoned before being sufficiently translated into the realm of action to satisfy the requirement of an overt act. But "carrying provisions towards the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different" (*ibid.*). Success is unnecessary.

With the exception of Judge Learned Hand's opinion in *United States* v. *Robinson*, 259 Fed. 685 (S. D. N. Y.), the modern reported cases on treason by adhering to the enemy likewise make clear that the sufficiency of the overt act depends neither upon successful giving of aid and comfort nor upon superficial "manifestation" of treasonable intent. These principles are inherent in the jury charges in the *Fricke*, *Werner*, *Haupt*, and

Stephan cases.[64] Judge Mayer's statement in the *Fricke* case is perhaps the most concise:

> An overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime. (259 Fed. 673, at 677).

But the same views have been expressed with equal directness in each of the other cases in which the problem has arisen. The decisions are marked by an almost surprising lack of judicial questioning, and unanimity of conclusion.

Judge Hand's opinion in the *Robinson* case is puzzling. It recognizes, with disapproval, that under *Lord Preston's Case* "aid and comfort need not reach the enemy," and that this "has since remained the law." (259 Fed. 685, at 690). Possibly, as suggested in the Appendix,[65] his dislike of what he regarded as an unfortunate but undoubted turn in the law led him to attempt a compensatory rationalization of the overt act as something that must show the treasonable intent

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[64] *United States* v. *Fricke*, 259 Fed. 673 (S. D. N. Y.); *United States* v. *Werner*, 247 Fed. 708 (E. D. Pa.); *United States* v. *Haupt*, 47 F. Supp. 836, 839 (N. D. Ill.), reversed without criticism of this portion of the charge, 136 F. (2d) 661 (C. C. A. 7); *United States* v. *Stephan*, 50 F. Supp. 738, 742–743, note, affirmed 133 F. (2d) 87, 99 (C. C. A. 6). The unreported opinion of Judge Clancy in *United States* v. *Leiner* (S. D. N. Y. 1943; printed as Appendix I to petitioner's first brief herein) alone follows Judge Hand's view as to the need for "manifestation" of treason by the overt act.

[65] Appendix B, II, 2, pp. ——.

on its face. Whatever the reason, his rationalization lacks support either in history or in contemporary judicial thought.

We draw from the cases, then, American as well as English, the conclusion that the function of the overt act in treason by adhering to the enemy—as in the other branches of treason—is to show that the accused has moved from the realm of thought or opinion into that of action—that he has done something about what he has in his mind. This act need not accomplish his objective; it need not "manifest" or "demonstrate" on its face his treasonable design; but it must, when related by adequate evidence to a treasonable intention, be sufficient to establish that the treason no longer rests merely in intention, but has in some way been put into execution.

So viewed, the overt act is a proper subject for the safeguard of the two-witness requirement. Overt acts are not just any incidental actions which may happen to occur concomitantly with the existence of the treasonable scheme, or during its execution. They are those parts of the scheme which constitute action in its furtherance, either effecting or attempting[66] the purpose to give aid and comfort to the enemy. We do not

[66] As shown by the discussion in Appendix B, II, 2, notes 61, there is much authority for the view that treason is essentially in the nature of an attempt. Indeed, it has been suggested that attempts in criminal law are historical outgrowths of the law of treason. *Id.*, note 61.

suggest, in the petitioner's analogy (Pet. II Br., p. 3), that a charge of treason by giving to the enemy secret information could be established by laying and proving as overt acts merely that while planning or preparing to give the information the defendant arose, ate breakfast, or tied his shoelace. Nor does Judge Mayer, when he says that the act "in itself may be a perfectly innocent act," mean that any such incidental acts as the petitioner suggests may be laid as overt acts of treason. Such acts would be insignificant in the treasonable scheme—inadequately related to it in terms of purpose or effectuation. What Judge Mayer means, what Foster means by reference to "an action, innocent in itself" (supra, p. 25), and what we mean, is that an act laid as an overt act of treason may be sufficient even though, when taken alone and isolated from all other evidence, it may fail to disclose to the observer that a treasonable purpose is being effected or attempted. But though it need not, in isolation, "manifest" the treason in the petitioner's sense, it must be such an act as, when viewed in the light of all the circumstances and itself proved by two witnesses, will establish that the scheme of giving aid and comfort to the enemy has been placed into execution—that action is being taken to give aid and comfort to the enemy—that allegiance is being betrayed.

The overt act, as so regarded, is an important and significant element in the proof of treason, whatever may be its superficial aspects. As the objective phase of the crime, perrequisite as a protection against punishing men merely for their thoughts or intentions, it clearly justifies the belief of the framers of the Constitution that to require two witnesses for proof of each overt act, as against the one theretofore needed, would provide a substantial safeguard against convictions by perjured testimony. There is no need to assume, as did Judge Hand, that the two-witness requirement would be meaningful only if the overt act must manifest the intent on its face, without need for corroborating evidence;[67] Wigmore, more cogently and with less deviation from history, fully justifies the requirement by pointing out that "the opportunity of detecting the falsity of the testimony, by sequestering the two witnesses . . . and exposing their variance in details, is wholly

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[67] *United States* v. *Robinson*, 259 Fed. 685, 691–2. Judge Hand also suggested that "the requirement of two witnesses probably had its rise from the canon law," and that "wherever it comes from, [it] implies a system of trial not rational in its processes at all." Although we find no evidence whatsoever that the framers of the two-witness requirement—in either its English or American form—were guided by anything but rational and contemporary realism, we have for the information of the Court included in Appendix A a short opinion on the nature of the two-witness requirement in canon law, prepared at our request by Dr. Stephan G. Kuttner, Professor of the History of Canon Law, The Catholic University of America, and Honorary Consultant in Canon Law, Library of Congress.

destroyed by permitting them to speak to different acts".[*] Furthermore, it is clearly enough established that the intent need not be proved by two witnesses; Mr. Justice Iredell and Judge Peters expressly so charged the jury at the first trial of *Fries*, Fed. Cas. No. 5126, 9 Fed. Cas. 826. Mr. Justice Iredell said, at p. 913:

> It is the opinion of the counsel for the prisoner that you must be convinced, not only of the fact by two witnesses; not only that he was concerned in a certain act, but that you must have the evidence of two witnesses, at least, by evidence drawn from the same place, that it was done with a treasonable intention, before you can pay any attention to any other evidence whatever. The fact is that, when the overt act is proved by two witnesses, it is proper to go into evidence to show the course of the prisoner's conduct at other places, and the purpose for which he went to that place where the treason is laid, and if he went with a treasonable design, then the act of treason is conclusive.

And Judge Peters, at p. 909, charged the jury that:

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[*] See Appendix B, II, 2, note 77. Cf. Dr. Kuttner's statement, Appendix A, p. 41, of the canonical view: "there will rarely be two perjured witnesses in whose testimony a prudent judge would not find flaws and contradictions (the case of Susanna, *Dan.* xiii, is always cited as classical example), while the full convergence of the observations made by two persons has the almost irrefutable presumption of truth in its favor."

> Two witnesses are necessary to prove the overt act. But the intent may be proved by one witness, collected from circumstances, or even by a single fact.

This distinction between the evidence required to prove the act and that required to prove the intent would be obliterated by a rule demanding that the testimony of the two witnesses to the act also establish the intent.

Nevertheless, it may still be asked what grounds of policy can support a construction under which lesser or different proof suffices to establish the vital treasonable intent than to establish an overt act which, at least to the two witnesses proving its commission, may appear totally innocuous on its face. One answer lies in the inherently different qualities of the two elements to be proved. Acts, in their nature, are susceptible of being perceived and proved. They are objective occurrences, establishable by observation and report, and none the less so because in particular instances the probative value of the testimony of the witnesses may vary with the keenness of their senses, the accuracy of their recollections, or the integrity of their purposes. But though witnesses can testify directly to what they saw a man do, they cannot testify directly to what he believed or intended. Intent, while equally a legal fact, is essentially a subjective element, deducible as a fact only by inference from observed actions. In its nature it cannot

be directly proved, but must be gathered as a matter of reasonable probability from acts which can be directly proved. Even the strongest inference of intent from unimpeachably proven acts may be upset by explanation, as when one marching in the uniform of the enemy—the observed act—is shown to be a spy for his own country. Intent is not the kind of legal fact to which a requirement of cumulative proof by direct witnesses can have any rational application.

Moreover, though the proof sufficient to establish the intent may be different in quality from that required to establish the overt act, it does not follow that any less convincing proof is or should be required.

The intent must be a specific intent, directed proximately at the betrayal of allegiance by levying war or by adhering to enemies, and established beyond a reasonable doubt. This insistence is most marked in the cases dealing with treason by levying war; mere casual or unpremeditated participation in riots, or spontaneous resistance to particular acts of governmental authority, has been excluded from the area of treason, not for lack of a sufficient overt act, but for lack of sufficient evidence of a specific intent to subvert the government.[69] The same note ap-

[69] See, for example, *United States* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 400, 402. (Circ. Ct. D. Vt.); and *United States* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 127. (Circ. Ct. E. D. Pa.).

peals in the adhering cases; although the addition of a non-culpable motive, such as personal friendship for individual enemies, will not of itself preclude guilt, yet the opinions have carefully defined the requirement of a specific intent to aid the enemy as such.[30] Showing of such an intent is, and should remain, an imperative necessity.

Treason is the gravest of all crimes. By its nature it can only be charged or suspected in times of tension, when heightened public passions tend to raise merely unpopular beliefs or desires to the stature of unpatriotic conduct, and enlarge the danger of unjust or unfounded accusations of disloyalty. Our Constitution protects freedom of speech and belief, freedom to advocate unpopular notions or courses of action, as much in time of war or civil dissension as in time of peace and quiet; and in recognition of these guarantees the courts under the Constitution have done great

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[30] See *e. g.* Judge Mayer's charge in *United States* v. *Fricke*, 259 Fed. 673, 676:

"If not satisfied beyond a reasonable doubt that the defendant's intention and purpose in acting as he did was evil—that is, if not satisfied beyond a reasonable doubt that he intended to aid and comfort the enemies of the United States—and if not satisfied that that was his object, the defendant must be found not guilty."

Cf. United States v. *Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628, 630; *United States* v. *Stephan*, 30 F. Supp. at 744, note, charge approved, 133 F. (2d) 87, 89 (C. C. A. 6). As we pointed out in our first brief, pp. 54–55, note 30, the same caution was exercised in the charge in the instant case.

service in averting abuse of treason charges as instruments of oppression. They have insisted upon careful definition of the offense, and strict requirements of proof, to the end that treason shall comprise only conduct truly aimed at the foundations of government—levying of war—or directed to securing the success of its external enemies—adhering to them, giving them aid and comfort.

Our advocacy in this case brings us into no conflict with these principles. We do not urge upon the Court a "liberal" or expansive construction of the constitutional definition, or a narrowing of its procedural safeguards. The controversies which have engaged the courts as to the types of conduct constituting treason have revolved around domestic disturbances, calling for careful balancing of the conflicting interests in individual freedom and civil liberties on the one hand and stability of government on the other. In this area, restrictive definition of the crime may well be dictated by the spirit of the Constitution.

But when the crime is actual adherence and giving aid and comfort to external enemies of the United States, the area of controversy is necessarily more limited. If the accused specifically intended to aid the enemy, and, with that intent, by action gave or attempted to give aid to them, decision whether his conduct should properly be punished as treason calls for no nice consideration of conflicting public policies. What he has done—

assuming he has done it—is the essence of treason, whether or not he succeeded in all that he intended to do. He still shares in the spirit as well as the letter of the constitutional guarantees, but his share is limited to the guarantees as to proof and punishment.

The petitioner asserts that the guarantees of strict and convincing proof call upon this Court to hold that the crime of treason by adherence to enemies, giving them aid and comfort, is not established unless the overt acts alleged and proved show on their face, without additional evidence, the treasonable intent with which they were committed, and—or perhaps in the alternative—that an overt act laid in the indictment and clearly proved is still insufficient unless it reaches beyond the stage of attempt to that of success. These assertions, we believe, lack substance both in history and in policy. We agree that strict and convincing proof is needed; and since this is the first treason conviction to come before this Court in its history, the Court may well feel that the occasion requires it to lay particular emphasis on the need for high standards of proof of specific intent as a protection against hysterical prosecutions and perjured convictions. By such means, we submit, rather than by the petitioner's proposed holdings, the Court can preserve the spirit of the treason clause of the Constitution without distorting the proper analysis of treason or perverting the his-

torical function of the overt act in the proof of that crime.

II

THE SUFFICIENCY OF THE OVERT ACTS INVOLVED IN THIS CASE, AND THE ADEQUACY OF THEIR PROOF

A. *Overt Acts 1, 2 and 10 Were Sufficient Overt Acts of Treason*

Our review of treason law in England and America, under Point I of this brief, leads us to the conclusion that treason by adhering to enemies is established if it is alleged and proved (1) that the defendant intended specifically to give aid and comfort to enemies of the United States, as such enemies; and (2) that he committed an act which put his intent into operation, whether or not it succeeded in accomplishing his intent. The act thus tending to effectuate the specific intent to aid and comfort the enemy must, of course, be proved by the testimony of two witnesses. We believe that by this proper test all three of the alleged overt acts submitted to the jury in this case were sufficient. They put into operation the petitioner's intent to give aid and comfort to the enemy, and they gave such aid and comfort.

The petitioner contends (Pet. II Br., p. 42) that the acts alleged "are not such acts as the proof of which, when accompanied with evidence of petitioner's allegiance to the United States and a traitorous intent would warrant submission of the case to the jury." Presumably, this criticism

is predicated upon the petitioner's further contention that the act of "meeting and talking with an enemy without more is not an act which on its face gives the enemy aid and comfort" (*ibid.*). We do not agree with the premise of the latter contention, that the act must "on its face give the enemy aid and comfort;" nor do we agree with the contention itself. It is sufficient, as we understand the law, if the act of "meeting and talking with an enemy" is an act in furtherance of, and undertaken for the purpose of effecting, a specific intent to give aid and comfort to the enemy.

So far as the form of the allegations is concerned, then, the three acts in question seem to us clearly sufficient. In each it is alleged that the petitioner performed a specific act—in overt acts 1 and 2 that he met or accompanied and "did * * * confer, treat, and counsel with" an enemy of the United States, and in overt act 10 that he "did give false information and make false statements" in itemized respects regarding an enemy of the United States. In each it is further alleged that the act was performed "for the purpose of giving and with intent to give aid and comfort to said enemy".[11] The trial adduced evi-

[11] The body of the indictment alleges that the petitioner "treasonably did adhere to the enemies of the United States, * * * giving to said enemies aid and comfort within the United States and elsewhere", and that the specific overt acts charged were committed "in the prosecution, performance, and execution of said treason and of said unlawful traitorous

dence that the acts alleged had been performed, and that in performing them the petitioner was forwarding the specific intent charged of giving aid and comfort to the enemy. Proof of these two elements, together with proof of petitioner's allegiance to the United States, clearly justified the submission of the case to the jury under proper instructions regarding the nature of the specific intent required.[72]

Although the several briefs filed naturally reflect some disagreement between the petitioner's understanding of the authorities and our own, the dominating note in the petitioner's position seems to be not so much analytical rejection of our view, as a feeling that there is something incongruous, or shocking, or at odds with American tradition, in treating as the grave crime of treason actions so ordinary-seeming as conversations, or misstatements to law enforcement officers (see Pet. II Br., pp. 42, 45). The implication is that an act should not be regarded as an overt act of treason unless the mere objective description of it carries sinister connotations, as with "giving the enemy intelligence, sending them provisions, selling them arms, treacherously surrendering a fortress and the like" (see Pet. II Br., p. 42).

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and treasonable adhering and giving aid and comfort to the enemies of the United States" (R. 2, 4).

[72] Except as the petitioner disagrees with the theory of the Government as to what is a sufficient overt act, we do not understand that any question is raised as to the adequacy of the instructions to the jury.

The petitioner neglects the fact that the techniques of warfare are no longer so elementary as in the periods which evoked his illustrations. Wars are no longer won merely by capturing fortresses. Moreover, his approach disregards the basic nature of treason, as a crime consisting of a specific intention to betray allegiance and to aid and comfort the enemy, carried into effect by an act done to accomplish the intention. Allegiance is the strongest and most fundamental obligation of an American citizen, and its planned, deliberate betrayal to an enemy at war with America is the gravest breach of that obligation which an American citizen can commit. What is there "at odds with American tradition" in holding to be treason *any* act by an American citizen done for the specific purpose and with the specific intent of aiding an enemy in a war against America? Degrees of culpability or obliquity in treason there may be, as in other crimes; their existence is recognized by the very statute under which the petitioner was convicted.[73] But the magnitude of the aid and

[73] As we pointed out in our first brief (pp. 63-64), recognition of such degrees is shown by the power conferred by the Constitution on Congress to "declare the Punishment of Treason" (Constitution, Art. III, sec. 3), and by the discretion which Congress under this power has conferred (Criminal Code, § 2, 18 U. S. C. 2) on the courts to fix penalties ranging from death down to imprisonment for only five years and fine of only $10,000.

comfort furnished or attempted affects only the severity of the penalty; it has no bearing on the fact of the commission of the crime. The crime was committed when the petitioner acted to put into effect his intention to betray his allegiance by giving aid and comfort to the enemy.

Moreover, we do not concede the insignificance—the lack of seriousness—which the petitioner seeks to attribute to the particular overt acts charged and in substance admitted here.[*] These acts cannot realistically be viewed in isolation, as "meeting and talking with an enemy without more" (Pet. II Br., p. 42), or "the mere making of a false statement which leads to nothing" (Pet. II Br., p. 45). They must be viewed in the context of the elaborate and detailed evidence presented to the jury, from which the jury was fully entitled to believe that the petitioner knew the hostile mission of the enemies with whom he was dealing, and that he acted to his utmost to help them in that mission in every way presented to him. We described these acts in their context in our first brief, and repetition may be unnecessary here. Nevertheless, we think it useful to summarize for the Court again at this point the setting in which the acts were laid, so as to illustrate the operative

[*] It is not now denied that the petitioner "actually, in the sense of physically, performed the acts alleged in the indictment." Pet. I, Br., p. 4.

significance which the jury was entitled to ascribe to them.[75]

The petitioner was charged with giving aid and comfort to Werner Thiel and Edward John Kerling, two of eight German saboteurs who landed on the eastern coast of this country in June, 1942, on a mission from the German government to damage or destroy the American light metal industry. Thiel and the petitioner had been close friends for many years. They had lived together and had been engaged in business together. From these associations the petitioner knew that Thiel was an alien enemy, and that his sympathies lay with Germany. He knew that Thiel had left the United States for Germany in March 1941 in anticipation of war between the two countries, and with the explicit desire to be on the German side in such a war. He corresponded with Thiel in Germany down to the date of Pearl Harbor, and the tenor of his letters revealed enthusiasm and admiration for the German cause.

In June of 1942 Thiel reappeared, mysteriously and furtively. His method of approach to the petitioner was in itself suspicious. A strange voice called petitioner's name from the hall of his rooming house, and on his failure to respond an unsigned note, in an unknown hand, was slipped under his door, directing him to meet

[75] The pertinent record references will be found in the similar passage at pp. 56–60 and 64–65 of our first brief.

"Franz from Chicago" at a named hour and place. Petitioner, though he testified that he knew no "Franz from Chicago", and had been unwilling even to answer the unknown voice calling him, nevertheless made his appearance at the rendezvous. "Franz" turned out to be Thiel. According to petitioner's own testimony he was startled, and asked several questions, only to be put off with evasive and noncommittal replies. They talked together for several hours, as a result of which petitioner, by his own admission, believed that Thiel had come on a mission for the German government, and that "whatever his mission was, I thought that he was serious in his undertaking."

Thiel mentioned the money which he had brought from Germany, and expressed reluctance at carrying it around with him. Petitioner offered to take charge of it and put it in his own safe deposit box. Thiel, while apparently agreeable to this, was still noncommittal, and nothing was done about it that night. They talked of Thiel's fiancee, Norma Kopp, and when Thiel expressed interest in her but seemed unwilling to get in touch with her directly, petitioner offered to write to her himself. Again, nothing was done that night. At Thiel's request they agreed to meet again the next night, not at petitioner's apartment, because Thiel had too many acquaintances there and did not want them to see him, but at the Twin Oaks Inn.

The meeting thus arranged, and begun the next evening at the Twin Oaks Inn and continued at Thompson's Cafeteria, constitutes the first and second overt acts charged. When they met at the Twin Oaks Inn, Thiel told petitioner that they were to be joined by Kerling, and that Kerling had come over with him from Germany. Kerling was in fact the leader of Thiel's group of saboteurs. Kerling joined them. He did not stay long. After he left, Thiel and the petitioner talked for some time, and then Thiel brought up the subject of the money. He went to the wash-room to take off his money belt. After they left the restaurant petitioner took the money belt and money from Thiel, and put them in his pocket. Thiel told him to take out the $200 which Thiel owed him, and also told him not to put all the rest in the safe deposit box, but to keep some in his room, so that he would not have to go to the bank all the time in the event Thiel had to call on him suddenly for some funds. Petitioner kept the money throughout the continuation of their conversation at Thompson's Cafeteria, and on returning to his apartment he put the money in a drawer and the money belt in his shoebox. The next evening he wrote Norma Kopp, as arranged with Thiel, asking her to come to New York for "great news," "a pleasant surprise," and "news of the most sensational nature," but cautiously avoided saying anything from which Thiel's arrival could be suspected. Thiel him-

self had suggested that no mention of his name be made in the letter. The following day petitioner put the bulk of Thiel's money in his safe deposit box.

In the light of the setting in which the meetings charged as overt acts 1 and 2 thus occurred, we submit that the meetings, marked as they were by friendly and earnest discussion by the petitioner and two known enemies of the United States, in themselves constituted aid and comfort to those enemies. Little imagination is required to perceive the advantage which such meetings would afford to enemy spies not yet detected. Even apart from the psychological comfort which the meetings furnished Thiel and Kerling by way of social intercourse with one who they had reason to believe would not report them to the authorities as a loyal citizen should, the meetings gave them a source of information and an avenue for contacts with others. The meetings enabled them to be seen in public with a citizen apparently above suspicion, and thereby to appear to be mingling normally with the citizens of the country with which they were at war.

But the significance of the meetings is by no means confined to these relatively intangible forms of aid and comfort to the enemy. The meetings had more content; they were part and parcel of a far more specific program. Peti-

tioner, though he might have not known the precise details of Thiel's mission, was fully aware of its seriousness, to such an extent that he warned Thiel that "anything that he might undertake would be ineffectual or useless". Thiel, on the other hand, needed a means to reach Norma Kopp without disclosing his presence. He needed a place to hide the money he had brought from Germany. He felt petitioner out on these matters at their first meeting, on June 22nd. He arranged a meeting between petitioner and his own leader, Kerling, which could have had but one purpose, approval of his course in accepting petitioner's assistance. Following the meeting with Kerling, Thiel entrusted his money to petitioner. From that moment on, petitioner, and not he, carried the large sum of money in gold notes. If they had been arrested as they walked to Thompson's Cafeteria, or as they continued their conversation there, possession of the money would have cast suspicion on petitioner, not on him. And if still later the money were to be found in petitioner's safe deposit box it would be petitioner, not he, who would have to explain its presence.

In fact, the money *was* later found in petitioner's safe deposit box, and it *was* he who had to explain it. When so pressed, he sought to explain it as his own, and when asked about Thiel he sought to camouflage him as a fictitious "William Thomas", who had not been out of the country

in over a year. These lies were the substance of the tenth overt act—false statements made, by the petitioner's own admission both on and off the stand, for the purpose of shielding Thiel's identity. That Thiel was already apprehended, and beyond his help, he did not know; but he did all he could.

It is a fact that the mission of Thiel and Kerling was nipped before the light metal industry could be destroyed; and by the same token the petitioner's aid and comfort fell short of producing for them successful accomplishment of their mission. But in anticipation of their mission, Thiel and Kerling, and their superiors in Germany, could hardly have hoped for more than that in the first few days after their arrival in New York they would be able to find a friend who would be willing to meet them, talk to them about their plans, hide their money for them,* and conceal their identity from the authorities in case of trouble. These things were the aid and comfort which in the initial stage of their mission they would have hoped and looked for, and which at that stage of their mission would have helped them most; and these were the things which the petitioner did for them. If he did them with specific intent to betray his allegiance to his country, and

* Hiding the money, though charged in the indictment as an overt act (R. 5-6), was not included in the overt acts submitted to the jury, and we refer to it not as an established overt act, but as part of the setting which gives significance to the overt acts upon which the conviction was based.

to give aid and comfort to its enemies, they are treason whether or not they sound as sinister as surrendering a fortress.

The petitioner protests with particular vigor (Pet. II Br., pp. 43–51) the acceptance of overt act 10 as a sufficient overt act of treason, not only on the ground that at the time of its commission the enemy was beyond aid and comfort,[11] but also on the ground of a peculiar unreliability in false statements to officers of the law as to the identity and whereabouts of confederates, especially when recanted a short time later. We recognize that words as such have generally been held insufficient to show that a treasonable intent has moved from thought to action. But here we have not mere words, but words used as an instrument to aid the enemy by diverting suspicion from him, and protecting him. These are not words as expression of belief or intent only, but words in action, offering by their utterance aid and comfort just as would words used to convey to an enemy secret military intelligence. And as to the other objections, they go not so much to the quality of the act charged as an act of treason, as they do to the certainty, as a matter of proof, whether the false

[11] As we pointed out in our first brief (p. 66, footnote 38), Thiel was not necessarily beyond aid merely because apprehended; petitioner's statements, if believed, might well have led to Thiel's being regarded as a draft-dodger only, rather than an enemy agent. We have made plain in the text that we do not in any event agree with the petitioner's proposed "success" test.

statements were made with the specific intent of giving aid and comfort to the enemy. They amount to a criticism that when false statements are made under such circumstances, it is very likely that the making of them does not represent a considered and specifically intended effort by the accused to aid the enemy. If that is so, the remedy, we believe, does not lie in rejecting the false statements as a legally sufficient overt act, but in great care in charging the jury as to the need for finding the requisite specific intent. When, as was the case here, the jury was properly charged that it could not convict the petitioner on the basis of this or any other overt act unless it was satisfied beyond a reasonable doubt that in performing the act he intended to aid Thiel and Kerling as enemies of the United States, and not merely out of personal friendship (R. 439, 440–441), the jury's verdict should, we submit, be permitted to conclude the question whether the false statements were sufficient to establish that treason had in fact been committed.

B. *Overt Acts 1, 2 and 10 Were Each Proved by Two Witnesses Within the Meaning of the Constitutional Requirement*

Our research into the history of the law of treason has thrown little further light on the precise meaning of the two-witness requirement, and we have substantially nothing to add to the discussion in our first brief (pp. 69–82), as to whether each

of the acts was proved by the testimony of two witnesses within the meaning of the constitutional requirement.

No question is raised as to the sufficiency of the proof of overt act 1, and we are not persuaded by petitioner's criticism of the proof of overt act 2. That act charged a meeting and conference with Thiel, for the purpose of giving him aid and comfort as an enemy. No time limits for the meeting were set in the indictment, nor was it charged that throughout the period of the meeting any particular matter was discussed. The meeting was laid as a single meeting, at two separate places, and the two same witnesses, Special Agents Rice and Willis of the Federal Bureau of Investigation, testified that the petitioner and Thiel met and were together at both those places. The petitioner's suggestion that one of the witnesses may not have testified to seeing the petitioner and Thiel together during all the time they were at one of the places is, we believe, factually incorrect,[*] but if it were

[*] The petitioner states (Pet. II Br., pp. 51–52) that Willis only testified "that petitioner and Thiel went into Thompson's Cafeteria, stayed there awhile having refreshment, and came out," and that he "did not testify that they were together while in Thompson's Cafeteria." But in fact Willis testified not only that they went into Thompson's Cafeteria and stayed there, but also that "from the time Cramer and Thiel left the Twin Oaks Inn, until they finally parted after leaving Thompson's cafeteria," he was "observing them all the while" (R. 102). His testimony could only have meant to the jury that he watched them together in the Cafeteria.

correct it would be immaterial. What the Government needed to prove, and what it did prove by the same two witnesses, was that Thiel and Cramer met and conferred, on a given evening, at two given locations. That they may also have been shown by the testimony of other witnesses to have met and conferred at the same places on the same evening is clearly irrelevant. Furthermore, the petitioner has adduced no authority, and we believe there is none, for concluding that an overt act of this character must be established in its entirety by the same two witnesses. Here, in fact, no less, and sometimes more, than three witnesses observed and testified to each portion of the meeting charged. We submit that by all known standards this proof is sufficient.[29]

As to overt act 10, the petitioner's second brief adds nothing new, and we rest on our contention in our first brief (pp. 74–75) that all the material portions of the alleged false statements were established by the testimony of two witnesses. We reiterate also our suggestion that in any event the testimony of the petitioner might well be regarded as supplying the deficiency of a witness, if a de-

[29] In his second brief (p. 52) the petitioner suggests that, assuming the same two witnesses must obser and testify to both parts of a divisible act, the addition of a third and cumulative witness to one part of the act vitiates the proof, since the jury might have believed the testimony of two different sets of witnesses to the two different parts. This is a *reductio ad absurdum* of the two-witness rule which we do not believe deserves comment.

ficiency existed. This suggestion has, so far as we can ascertain, never been discussed in the authorities, and our reasons for proposing it as a proper rule are fully set fort. in our first brief (pp. 75–79). The validity of the suggestion is not impaired by the cases cited by the petitioner,[50] which stand only for the indisputable propositions that neither testimony by a witness to the accused's admission out of court, nor testimony by the accused as to facts without admission of guilt, amounts to a confession within the meaning of the alternative constitutional requirement.

CONCLUSION

We respectfully submit that the petitioner's conviction was in accordance with the Constitution and the law of treason, and that his trial was in all respects properly conducted. Accordingly, the conviction should be affirmed.

CHARLES FAHY,
Solicitor General.
CHESTER T. LANE,
Special Assistant to the Attorney General.
NOVEMBER 1944.

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[50] Pet. II Br., pp. 56–58: *United States* v. *Magtibay*, 2 Philippine Reports 703, (1903); *United States* v. *Greiner*, Fed. Cas. No. 15,262, 26 Fed Cas. 36 (D. C. E. D. Pa.).

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No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1944

ANTHONY CRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDICES TO BRIEF FOR THE UNITED STATES ON REARGUMENT

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FOREWORD

The following appendices have been prepared at the request of the Solicitor General. The authors of the appendices were requested to avoid argumentative support of any particular position, and to select material for inclusion or exclusion solely on the basis of its reliability and its relevance to the questions under review by the Court. The appendices are submitted to the Court in the belief that they constitute a fair, dispassionate, and informative analysis of the law of treason; but the Government does not in any way assume responsibility for, or necessarily agree with, the inferences drawn or the conclusions expressed by the authors.

Parts I and II of Appendix A, dealing with treason in civil law, were prepared, respectively, by Dr. Elio Gianturco, Research Assistant to the Foreign Law Section of the Law Library of Congress, and Dr. V. Gsovski, Chief of the Foreign Law Section of the Law Library of Congress. Part III of Appendix A, dealing with the two-witness requirement in canon law, was prepared by Dr. Stephan G. Kuttner, Professor of the History of Canon Law, The Catholic University of America, and Honorary Consultant in Canon Law to the Library of Congress.

Appendix B, dealing with the history of treason in English and American law, was, with the exception of the section dealing with English case

law prior to 1790, prepared by Willard Hurst, on leave as Associate Professor of Law, University of Wisconsin, whose services were made available through the courtesy of the Navy Department. The section on English case law prior to 1790, although revised and edited by Professor Hurst, was primarily prepared by attorneys on the staff of the Department of Justice.

The preparation of the appendices was made possible by the courtesy and cooperation of Professor Eldon R. James, Law Librarian of Congress, who freely made available both the facilities of the Library and the extremely valuable services of many members of its staff.

APPENDIX A

Civil and Canon Law Materials

I

The Crime of High Treason from the Romans to the Second Half of the 13th Century*

In determining the attitude of Roman law toward high treason—*perduellio, laesa majestas*—it is naturally necessary to keep in mind that such attitude underwent change during the various epochs of Roman history. According to the state-form, content and scope of high treason vary. During the early patrician and regal period, the stern character of the Roman state, uninterruptedly fighting and unceasingly menaced by war, was pre-eminently unfavorable to any attempt directed at mitigating the harsh punishment attached to crimes like the *perduellio* which the Roman polity considered as nefarious breaches of the "quiritarian" religion. During the republican age, as long as political liberty buttressed civil liberty, the number of the categories of crime which came under the designation of *laesa majestas*, high treason, did not exceed certain natural and reasonable bounds. It was Sulla (138–78, B. C.), who, as a leader of the aristocratic reaction, having become dictator, was the

*Prepared by Dr. Elio Gianturco, Research Assistant, Foreign Law Section, Law Library of Congress.

first to enlarge those bounds by issuing the *lex Cornelia de majestate* (80 or 81 B. C.).[1] Under this law, the sole object of which was the establishment of tyranny, not only light crimes, but a simple negligence, a purely casual remark, were sufficient to bring about charges of *laesa majestas*. As the law granted complete immunity to calumniators, rumor reigned unchecked and delation flourished; it would be unthinkable, under such conditions, to expect the law, defeating its own purpose, to establish distinctions between intent and perpetration in cases of *laesa majestas*.

It was a currently recognized principle of Roman law that, in case of ordinary offenses, no one could be punished for merely having entertained the thought of committing a crime: "*cogitationis poenam nemo patitur*"; stated Ulpian (*Digest*, Book 48, title 19, fragment 18.) But the rule was not applicable in cases of *laesa majestas*. However, the Roman jurists felt this derogation from the principle "*cogitationis poenam nemo patitur*" to be against the dictates of reason; and they expressly pointed out that its recognition as a criterion of adjudication was due exclusively to reasons of political expediency. (See *Digest*, Book I, title 16, fragment 3). "Public" criminal law, in Rome, was never treated by jurists in a systematic fashion.[2]

In so far as high treason is concerned, the distinction, made today, in each crime, of four ele-

[1] At the time of the lex Cornelia, the concept of *perduellio* was still extant; it became obsolete through Caesar's *lex Julia de vi et majestate*.

[2] Sources, in the *Corpus Juris*, of provisions concerning high treason: *Digest*, Book 48, 4; *Codex*, 9, 8; and *passim*.

ments, the first of a subjective, the remaining ones of an objective character—the distinction, that is, between mere intention, preparatory acts, attempt, and consummation—was not drawn and far less practiced by the Romans. Roman law, in cases of high treason, does not differentiate attempt from consummation, preparation from perpetration. It has been remarked, however, that this is not a singularity of the crime of high treason, inasmuch as, in all *delicta publica,* no differentiation whatever was made between those aspects. In the domain of the *delicta privata,* at least three elements (intention, attempt, consummation) had been recognized and singled out by individual jurists, and in regard to particular crimes. These jurists emphasize the distinction between *voluntas sceleris, affectus* (intent), on one side, and *effectus* (consummation) on the other; they contrast attempt with consummation (*conatus—effectus*), *injuria coepta* with *injuria consummata.* But in public law distinctions were utterly disregarded, and no attempt was ever made to discriminate preparatory acts from attempt, inception from performance. Next in importance, after the *lex Cornelia,* is the *lex Julia de vi et majestate,* (46 B. C.) introduced by Caesar, and which forms the basis of all other laws *de majestate* issued during the imperial period. During the period of Sulla's domination and during the principate, when the pressure of despotism became more and more intense, theoretical speculations aiming at a separation of attempt from performance in *delicta publica* would have been entirely devoid of any bearing on practice.

The enactments which followed the *lex Julia*, i. e., the laws of Augustus, Tiberius, Caligula and Nero, give us, in intensified progression, a shocking picture of the lengths to which imperial perversity carried the concept of *laesa majestas*. According to Tacitus, the charge of high treason was used as *omnium accusationum complementum* (Annals, III, 38). In his biography of Tiberius, Suetonius relates that the fact of having flogged a slave before a statue of the emperor, or of having changed one's clothes before it, or of having worn a ring bearing the ruler's likeness to a necessary or a house of ill-repute was accounted sufficient cause for capital punishment.

According to Pliny, the accusation of *laesa majestas* is one that can always be leveled against any person: it is the crime of those who are innocent of any crime. It was only transiently that, due to the great personality of a single ruler, as was the case with Nerva, Trajan, Hadrian, Antoninus Pius and Marcus Aurelius, and—in later times—with Alexander Severus and Theodosius—a stop was put to these aberrations. Even "philosophically trained" individual rulers like Julian showed themselves to be no better than the common run in this respect. Under Gratian and Valentinian things came to such a pass that crimes which had absolutely nothing to do with *laesa majestas*, such as poisoning, rape, adultery, etc., were viewed as falling within the category of high treason and punished as such. The climax was attained under Arcadius and Honorius. Their law on high treason, the atrociously harsh *lex Quisquis*, issued in 397, which appears not only in the

Theodosian and Justinian Codes, but also in Theodoric's Edict, in Canon Law, and the Golden Bull of Charles IV, established that bare intent is punishable.[3] Not only the direct perpetrators of crimes of *laesa majestas* should be punished, but their sons should be disinherited and their daughters should receive only the *quarta falcidia*.[4] A definition of *laesa majestas* was never given. Quintilian says: "It is extremely important to determine what constitutes a crime of high treason. Attempts to define it give rise to numberless cavillings." (*Institutiones oratoriae*, Book VII, Chap. 4). No Roman jurist or legislator ever undertook to give a specific and complete list of all the offenses constituting high treason. During the late empire, rulers continued to follow the practice, adopted by their predecessors, of enlarging the compass of *laesa majestas*.

On the other hand, the principle, unconditionally valid in case of *delicta privata*, that no man becomes an accomplice to another person's crime merely by the fact that, although being able to prevent it, he failed to do so, seems to have been a ruling maxim in Roman public law as well. Some historians, however—Mommsen, for instance—dispute this point. At any rate, it is a fact that not even the *lex Quisquis* marks a divergence from that principle. It remained for later ages to give legislative sanction to the principle of "commissive omission," i. e., to establish a penalty for failure to disclose a crime of which

[3] Cod. Just. ibidem. "eadem enim severitate, voluntatem sceleris qua effectum puniri jura voluerunt."

[4] Cod. Just. 9, 8, 5.

one is cognizant and whose consummation is impending.[5]

In regard to crimes characterized by *dolus malus*—and high treason decidedly belongs to this category—apparently no effort was made, prior to the fourteenth century, to construct a systematic theory of judicial decision based on the tripartition, with which we moderns are so familiar: intent, attempt, consummation. Gandinus (Alberto de Gandino) seems to have been the first deliberately to undertake this task. In his treatise *"De maleficiis"* (composed between 1305 and 1310), (whose influence may be traced down to the sixteenth century, in the criminal legislation of Charles V), the *magnus practicus* wrote: "If someone conceives the intention [of perpetrating the offense], makes the attempt, and consummates the crime, he shall be punished: If he conceives the intention, and makes the attempt, but does not consummate the crime, a distinction must be drawn. Either he willed and [no obstacles standing in his way] could have been able [to commit the crime];[6] or he willed, and did not have the possibility [was prevented by outward circumstances] to commit the crime. In the first case, he may be pardoned for having willed. But if his

[5] Paulus, *Digest*, 50, 17, 109: "no punishment shall be inflicted on the individual who, although being able to prevent crime, failed to do so." It may be added that in late Roman legislation, failure to consummate the crime (in case of ordinary offenses) is, sometimes, mentioned as an extenuating circumstance.

[6] In Roman republican times, this principle ("ar potuit facere") must have played a definite role in judicial practice.

failure to commit the crime depends on the fact that outward circumstances not in his control prevented him, he shall be punished, since in crimes it is the intention of the doer, not the outcome that must be taken into account. If he had the intention to commit the crime, but did not consummate it, a distinction must be made. In case of ordinary crimes, he shall not be punished; but if it is a question of treason, he shall be visited with a penalty." (*De maleficiis, rubrica de poenis reorum*, n. 2). It is clear from this passage that although doctrinal elaboration of the principles of criminal law has made considerable progress since Roman times, the situation in the fourteenth century remains unchanged—the intent is still punishable—in respect to the crime of treason.

On the other hand, in the domain of ordinary crimes, the principle *aliud est crimen, aliud conatus* was definitely established in the sixteenth century by Andrea Alciati who in his commentary on fragment 53 of the title of the *Digest* entitled *De verborum significatione*, gave an admirable description of the *iter criminis*.

Down to the end of the seventeenth century, the punishability of mere thoughts in crimes of *laesa majestas* was a conviction unalterably voiced by most criminalists. Not a few writers contended, on the basis of the *lex Quisquis* of Arcadius and Honorius, that mere *cogitatio*, even when no act had resulted from it, was sufficient to bring about an indictment for treason. Clarus, Menochius, Farinacius were exceptions to this trend. As for deliberate intent—*affectus*—Clarus (1525–1575) says expressly that the *communis opinio* of his time

was that, although in other crimes the *affectus* is not punished unless the crime actually occurs; in cases of high treason, instead, mere intent renders liable to punishment, "even if the crime did not take place."

In so far as ordinary crimes are concerned, we may here remark in passing that juristic history evinces a continuous oscillation between different doctrines in regard to the attempt. There is no definite adoption of a final theory. The reason is that, whereas the concept of "consummation" is evident, that of "attempt" is extremely hard to determine.

In the case of *ordinary* crimes a decided forward stride toward the distinction, established in modern theory, between preparatory acts, attempt and consummation, was taken by Menochius (1532–1607). Analyzing the criminal process, Menochius clearly differentiates between (1) remote acts [we may term them ante-preparatory acts]; (2) proximate acts [these are what today we call preparatory acts]; (3) very proximate acts [acts in execution of the crime]. Given the trend of the common opinion of his age, Menochius' theory had no practical application in so far as acts of high treason were concerned. It is interesting however to observe that in the field of theory Menochius' distinction visibly underlies a basic pronouncement by perhaps the most famous of his successors, Farinacius. (1544–161[illegible]) "In cases of higl treason, the attempt is punished even if there was no consummation of the crime * * * In such cases mere conspiracy, or mere intent and scheming, or preparatory acts

are punished with the same penalty as if the crime had been consummated." (Farinacius, Quaest. CXVI, par. IV.)

This passage of Farinacius is noteworthy as it shows that the modern theory regarding the steps of crime was already formed in the 16th century. Farinacius has a clear awareness of the distinction between "conspiracy" (which he calls *tractatus*), "intent" (*consilium*), "scheming" (*machinatio*), and "arranging means to be used in the perpetrating of the crime" (in the text: "ordinatio" which approximately corresponds to our "preparatory acts."). To all intents and purposes, such distinctions exercised absolutely no influence on practice in the domain of high treason.

In regard to the distinction between treason against the ruler and treason against the country, a distinction which is reflected in the German terms Hochverrat and Landesverrat, the earliest writer who clearly formulated the difference between the two types of crime was Angelo dei Gambiglioni in his Tractatus de maleficiis of 1472. That distinction plays a great role in the Prussian Landrecht of 1794, in the German Criminal Code of 1871, where that bipartition is basic, and in subsequent legislation and doctrine of the 19th century.

Not only was practice in Europe lagging far behind theory, but while, in the field of the syste-

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Farinacius acknowledges the difficulty of giving an adequate definition of high treason: he states that it is wrong merely to enumerate, in a mechanical fashion, the characteristics of this crime, since a definition must be based on *genus proximum et differentiam specificam*.

matic treatment of ordinary crimes, writers were elaborating appropriate logical distinctions such as those just mentioned, absolutistic practice, signally in France, was reverting to the principles of Roman imperial despotism. The great French jurist Domat (1625–1696) informs us that "in cases of treason, intent to commit the crime, even when not followed by any execution and *even when manifested when such intent does no longer exist,* shall be visited with the same penalty as would have been attached to the crime actually consummated." (Domat, *Supplément au droit public,* Book III, title 2, art. 5). French law of the 17th century took for granted that even an abandoned criminal intent could be punished.

Despotic arbitrariness found a powerful ally in legislative disorder. France trailed considerably behind other European nations in the establishment of a code exclusively devoted to criminal law. It was not until October 6, 1791, during the French Revolution, that such a code was established. Prior to that time, legislative chaos prevailed. An outstanding 18th century jurist graphically describes it in the following terms: "all laws fight with each other in regard to preeminence, scope of jurisdiction, and content: Latin enactments are in opposition to French ordonnances; old ordonnances with new edicts, edicts with declarations; and all of them together with the decisions of the courts. Such anarchy is enough to make the best legal mind dizzy."

The number of monographs dealing with attempt which appeared in the 18th century is almost double that of those published in the 17th

century.[8] Apparently no investigations devoted solely to a treatment of the attempt in crimes of high treason appeared in the 18th century.

Montesquieu, in his *Esprit des Lois* (1748), Book XII, Chapters VII–XIII, XVI, XVII, takes up

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[8] Here is a bibliographical listing by no means claiming completeness:

17th Century Works:

Hoyer, Diatribae de conatus. Lieseen, 1637.

Stok, De conatu. Marburg, 1639.

Dilherr, De conatu poenam secundum naturae et voluntaria jura incurrente. Alton, 1646.

Schlegel, Disputa de conatu. Jena, 1667.

Turcke, De maleficiis coeptis. Helms, 1680.

Sulzer, De impunitate conatus in delictis. Leipzig, 1688.

Passerino, De occidente unum pro alio. Palermo, 1693.

18th Century Works:

Mencken, L. De impunitate conatus in delictis. Leipzig, 1705.

Alers, De poena cogitationum. Bremen, 1713.

Starinski, De poena conatus. Regiom, 1714.

Vereick, De cogitatione a poenis libera. Leyden, 1730.

Tenzel, De poena criminis imperfecti. Erfurt, 1730.

Thomasius, Problema juris criminalis an poena delicti ordinaria puniendus sit conatus proximus. Leipzig, 1735.

Hertzog, De crimine conatus. Jena, 1735.

Brückner, Dissertatio sistens crimen conatus. Jena, 1735.

Jahn, Harmonia juris naturalis et criminalis in doctrina de imputatione criminalis attentati. Leipzig, 1736.

Bommiel, De cogitatione et conatus in poenalibus. Lyons, 1766.

Hoffmann, De initiis delictorum, Tügingen, 1768.

Graaff, De poena conatus. Groningen, 1779.

Heldemann, De conatu delinquendi. Halle, 1799.

in detail the problem of *laesa majestas*. As the greatest representative of juridical liberalism in the 18th century, he wages a devastating fight against the whole absolutistic tradition of the punishment of "mere thoughts" (*nuda cogitatio*) in cases of high treason. A significant passage of *Esprit des Lois* (Book XII, Chap. XI) reads: "The laws do not take upon them to punish any other than *overt* acts." It is perhaps possible that this passage, in which Montesquieu seems to derive inspiration from the famous English statute of Edward III (1350) commented on by Coke in his *Third Institute* (Coke, *The Third Part of the Institute of Laws of England Covering High Treason and other Pleas of the Crown*, 5th ed., London, 1671, p. 12, 13), might have suggested to Benjamin Franklin the introduction into the American Constitution of Article III, Section 3: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

In regard to preparatory acts, during the Enlightenment period the *communis opinio* is that they should be punished. The authors of the 18th century, chief among them Montesquieu, as we saw, emphatically maintain that *mere thought* is not punishable—and this is a reaction against the cruel aberrations of absolutistic practice—but they do not try to draw a distinction between preparatory acts and attempt. Attempt, in their mind, includes the preparatory acts; and these

are to be punished by reason of their being constitutive elements of the attempt itself. The constantly recurring theme of the Enlightenment's opposition against absolutism is the emphasis on the distinction between the purely internal, cogitative aspect and the external aspect, realized-by-the-attempt, of *lèse majesté*, but jurists of their period, in regard to this crime, do not advocate a distinction between attempt and consummation.

Montesquieu may again be quoted to illustrate this point:

> Words carried into action assume the nature of that action. Thus a man who goes into a public market-place to incite the subjects to revolt, incurs the guilt of high treason, because the words are joined to the action and partake of its nature. It is not the words that are punished, but an action in which words are employed. (*Esprit des Lois,* Book XII, Chap. XII.)

The problem concerning the point at which the boundary-line between attempt and consummation in crimes of high treason should be drawn, falls, therefore, outside the conceptual interests of 18th century criminalists. (In the 19th century, agreement on general principles, on the part of doctrinal writers, did not prevent them from reaching diametrically opposite conclusions in so far as the problem of fixing the boundary-line between attempt and consummation is concerned.)

In general, the 18th century reformers and writers on criminal law, beside combatting the tendency to punish mere thought, pressed for a

substantial reduction of the number of categories of crime which the concept of *lèse majesté* was employed to cover. Furthermore, those reformers and writers valiantly opposed the vague, indeterminate character of the idea of *laesa majestas* in which they saw a tool of absolutistic arbitrariness, and urged legislators to adopt unambiguous, clearly defined formulations of actions which were to be construed as constituting crimes of high treason. Hence, a characteristic feature of the 18th century technical literature on criminal law is that, in decided contrast to preceding ages, it pays close attention to classification of the various types of high treason. The two best-known "practical" writers on criminal law of 18th century France, Jousse and Muyart de Vouglans, both maintain that in cases of high treason, the attempt should be treated with equal severity as the fully consummated crime. Jousse (*Traité de la justice criminelle en France*, 1771, T. III, p. 697) states that in the prevailing practice of his time "the mere intent, whether manifested by witnesses or by the declaration of the culprit, was visited with punishment." In Jousse's view, the ignominious character of the crime of high treason consists "not so much in the performance as in the intent, machination and will, which constitute the consummation of the culprit's maliciousness and evil purpose."

Muyart de Vouglans, in his *Institutes au droit criminel* (Paris, 1747, p. 92) likewise points out that "according to the law, intent more than performance must be taken into account." The distinction, currently drawn in 18th century

France, between *conatus remotus* (preparatory acts) and *conatus proximus* (acts closest to consummation) in ordinary crimes, found no application in cases of high treason.

In Germany of the second half of the 18th century, the common opinion of the writers on criminal law is—in so far as the equal treatment of attempt and consummation in cases of high treason is concerned—identical with that of their French counterparts.[1]

Let us now cast a brief glance over the principal legislations of the 18th century.

Whoever studies this period of legislative history cannot fail to be struck by the influence which theory exerted on practice. The doctrines of natural law, the contractual theory concerning the genesis of the state, were powerful instruments of institutional and intellectual transformation. A unified opinion as to the purpose of punishment was formed, and this opinion became basic to the progressive work of positive legislation.

The movement, as evinced by theory, was not reflected *at once* in practice. The formal date of inception of the Enlightenment period may be set at 1748 (publication of Montesquieu's *Esprit des Lois*) or, at the latest, 1764 (appearance of Beccaria's essay on *Crimes and punishments*). But before 1786 codifiers did not become fully aware of the fact that they were adopting a philosophi-

[1] See for instance: Grolman, *Grundriss des Criminal Rechtswissenschaft*, paragraph 330; Klein, *Grundsaetze des peinlichen Rechts*, par. 502; Martin, *Lehrbuch*, par. 208, note 13.

cally grounded basis in regard to the conception, function, and purpose of punishment.

The *Codex Juris Bavarici Criminalis* of 1751, and the *Constitutio Criminalis Theresiana* of 1768 must be classed, in view of the harsh penalties which they contain, among the vestigial structures of a slowly obsolescent past.

Article 61, paragraph 2, of the *Constitutio criminalis Theresiana* deals with the *crimen laesae majestatis* in the first degree, and establishes that, in this crime, guilt is incurred through *sola voluntas* (bare intent), through the attempt, through misprision, and failure to prevent the crime. The text reads:

> Charge for this offense is incurred not only through the perpetration of the crime, but also through the intent to commit such an abominable misdeed, whenever evidence of intent is given in the forms prescribed by law. Charge is, all the more, incurred whenever an attempt, or preparations for that crime have actually taken place. Likewise, if an individual, who knew about that criminal intent and highly dangerous preparations, failed to report them at once and to the proper authority, while being in a position to do so, he shall be charged with the crime. If, being able to prevent the crime he failed to do so, he shall likewise be held guilty of the crime.

A striking contrast to the *Theresiana* is provided by the Code of Penal laws issued by Grand-duke Pietro Leopoldo of Tuscany in 1786. This "Reform of the criminal law of Tuscany" is easily the most notable expression of the advanced liberal spirit of the 18th century. The Grand

Duke of Tuscany was not only a fervent admirer of Montesquieu, Beccaria, Filangieri, and other reforming pioneers, but made a concrete effort to embody their ideas in positive legislation. He went farthest on the road of reform than any contemporary European ruler. His work, in the opinion of many historians, deserves to be called one of the most splendid legislative monuments of the age of the Enlightenment, the most precious legacy that criminal legislation of the 18th century left to the 19th. In punishment, remarks Calisse, [the Grand Duke of Tuscany] did not see, as did most, merely a means of social defense, but aimed to use it as a satisfaction for private and public injury, a corrective of the criminal, and a public example. The Tuscan reform was inspired by the rational conviction that the mitigation of punishment, joined with the closest vigilance in order to forestall crime, quickly expedited trials, and unfailing penalties are bound to bring about a diminution rather than an increase of crime. Pietro Leopoldo undertook to change the penal system of Tuscany from the roots. In so far as *lèse majesté* is concerned, he completely abolished this type of crime, which has no place in his code. Article 62 of the "Reform of the criminal law of Tuscany" states:

> We order that all the laws which, through abuse, have constituted, extended, and multiplied the crimes called *lèse majesté*, as having their principal source in the despotism of the Roman empire, and as not being admissible in any well-regulated society, be abrogated and abolished. And to remove this abuse; abolishing all

the crimes which are thus specially entitled *lèse majesté;* abolishing, as has been already prescribed in a general way, in the twenty-seventh article, all privileged or presumptive proofs, even in cases of similar crimes; and entirely abolishing the guilt of all those actions which are not criminal in themselves; but are only become so in these cases by the law; we order that all others, such as robberies, violence excepted, be considered in their respective classes as ordinary transgressions, more or less qualified according to the circumstances, and be punished as such, without considering the aggravation which, under the pretext of *lèse majesté,* or high treason, has been annexed by the law.

And it is consequently our will, that all violence in whatever way they may have been committed, or attempts against the security, liberty, and tranquillity of the government, without any exception, shall be considered in the class of public violences, and as such shall be liable to any degree of punishment, not excepting the last, which the greater or less atrociousness of the violence employed may require.

Unfortunately, the Grand Duke of Tuscany's reform was not long-lived. "He began to tear down his own edifice by re-establishing in 1790 the death penalty [which he had abolished]." The reaction became still more marked under the government of his successor, Ferdinand III.

The code of Frederick of Prussia, the *Allgemeine Landrecht* of 1794 (which deals with criminal law in articles 1577 ff., title 20, Part II), contains clear definitions of what constitutes high treason, adopts the bi-partition Hochverrat-

Landesverrat, but equates attempt and consummation in cases of high treason. It does not, therefore, depart from the common pattern of 18th century criminal codes, although it provides that a lesser penalty than that attached to consummation shall be incurred by the attempt.

The criminal reform brought about by Pietro Leopoldo is almost contemporary with the codification of his brother, Joseph II of Austria who, under the influence of Sonnenfels issued in 1787 his *Josephina,* or, as the official title reads, "A general law concerning crimes and their punishment." The *Josephina* has been termed a typical product of the Enlightenment. Although it marks a considerable advance over the *Constitutio Criminalis Theresiana,* it represents, on the other hand, a distinct retrogression in comparison with the criminal code of Tuscany. This is evidenced in particular by the fact that, in the *Josephina,* criminal attempt is equated with consummation, even in ordinary crimes. Paragraph 9, Part One, states:

> Although the thought [of committing a crime] and an inwardly evil intent alone cannot be considered as criminal offenses; it is not, nevertheless, necessary that the evil deed be actually consummated. The mere attempt at crime is a crime, as soon as the delinquent actually makes ready to perform it, and manifest his intention through external indicia and through an act. It does not matter that the act is not consummated, either because of inability on the part of the delinquent, or because of interposition of obstacles not dependent on his will, or on account of some fortuitous circumstance.

It is interesting to mention that this provision was adopted by the French Criminal Code of 1791 (through the law of Prairial 22, IV): "*toute tentative est le crime meme,*" and later, by the Prussian *Strafgesetzbuch* of 1851. The French Criminal Code of 1810, which is still in force, preserved the ruling.

II

TREASONABLE CRIMES UNDER THE CRIMINAL CODES OF CONTINENTAL EUROPE*

PRELIMINARY

The present memorandum aims to supply modern civil law materials which may be of use in interpreting the treason clause of the Constitution. This material is limited to the laws of non-fascist, non-totalitarian regimes. The treason clause of the Constitution raises three main problems:

1. Two-witness requirement.
2. The concept of an overt act.
3. Concept of aiding and comforting the enemy.

1. *Two-Witness Requirement*

The civil law contains no such evidential requirement in connection with any crime including treason or related offenses. Towards the end of the 18th century the opinion gained a general recognition in European penal thought that no

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rules of evidence should bind the court and that no evidential requirements should be written into the penal clauses of a statute. Therefore, no similar clauses are to be found in the penal codes of the civil law countries. The basic doctrine is that the trial judge appraises and weighs the evidence, being guided by his conscience and experience only.[1] Furthermore, separation of powers between the police authority and independent judiciary is relied on to provide protection of the accused against unfounded prosecution by the political authorities.[2] No helpful analogy or advice can therefore be drawn from civil law sources regarding the meaning or application of the two-witness requirement of the treason clause of the United States Constitution.

2. *The Concept of an Overt Act*

European theorists of criminal law recognize two distinct elements in an offence: the external element—human action, and the internal—the malicious frame of mind of the perpetrator, i. e., his guilt (intent or negligence). For the application of criminal law, that is, the infliction of penalty, both elements must be present in one form

[1] This generally accepted doctrine was expressed in some codes of criminal procedure, for instance, the German Code of Criminal Procedure:

"Sec. 261. The court shall draw the conclusions from presented evidence, following its free conviction, derived from the entire trial."

[2] One of the technicalities showing this principle is that the records of police investigation, as a rule, cannot be read at the trial.

or another.[3] It seems to be more convenient to analyse these forms for each element separately.

A. *Offence as an act.*—The principle that a man is not held criminally liable for his thoughts alone became a definitely established principle of the criminal codes of continental Europe in the 19th century. To be punished, a malicious frame of mind must be manifested in an act of commission or omission.[4]

However, the notion of an act as regards the crimes against the external and internal safety of the State was conceived in a manner different from that used with regard to other crimes. The generally accepted principle, *nullum crimen, nulla poena sine lege,* (no crime and no penalty except as established by statute) required from the penal statute a detailed specification of those acts for which a penalty may be imposed. The Judge cannot pronounce condemnation in a criminal case for an act not provided for by statute.[5] An act committed is not punishable unless it bears all the indicia of an offense as stated by the statute at the time when committed. Hence the broad concept of high treason, or treason (*lèse majesté*) inherited from Roman Law and used down to the

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[3] Garraud, R., *Traité théorique et pratique du droit pénal francais* . . . 3rd edition, Paris. Librairie de la Societe du Recueil Sirey. 1913. Tome Premier, p. 472.

Liszt, Franz v., *Lehrbuch des deutschen Strafrechts*, 25th ed., revised by Dr. Eberhard Schmidt. Berlin, Walter de Gruyter & Co. 1927. p. 145.

[4] Garraud, *op. cit.*, p. 474.

[5] Donnedieu de Vabres, H. F. A. *Traité élémentaire de droit criminel et de législation pénale comparée.* Paris Librairie du Recueil Sirey [1938], p. 65 *et seq.*

end of the 18th century was broken into a series of specific definitions of individual acts constituting each a separate crime. But all of these crimes formed two groups: one called "crimes against the external safety;" and the other, "crimes against the internal safety of the State," against the ruler and the constitution.

Thus the broad concept of treason ceased to exist and an offender had to be charged for one or another of the specific crimes into which treason was subdivided. Thereby the possibility of applying any of the definitions of external treason for the suppression of an internal political opposition was reduced to a great extent.

However, some of the crimes which replaced the *lèse majesté* continued to be treated in an exceptional manner, peculiar to the treatment of the crime of *lèse majesté*. This peculiarity may be summarized as follows.

With regard to all crimes, three main stages in the realization of a malicious frame of mind are distinguished: preparation for, attempt at, and accomplishment of a crime.[6]

The first stage, termed "mere preparation," consists in the acquisition or the assembling of objects and means which might be used for a crime, without, however, initiating steps which would lead directly to the accomplishment of a crime. A man may buy a revolver to perpetrate a murder, or a master key to commit a larceny but may stop at that point. The general rule is that mere preparatory activities are not punishable unless they

[6] Garraud, *op. cit.*, p. 475. Donnedieu de Vabres, *op. cit.* p. 137. Liszt, *op. cit.* p. 289 *et seq.*

constitute an offense in themselves, or a specific statutory clause declares them punishable. Consequently, if preparation for a given crime is not mentioned in the Criminal Code, it is not punishable.[1]

The second stage is the attempt, which takes place whenever a man undertakes, with the intention to commit an offense, activities immediately directed to the realization of his intent, but the designed effect does not take place. The crime fails of accomplishment either because it was prevented by some circumstance beyond the offender's control, or because the offender voluntarily ceased to act before the effect took place, or withdrew from the execution.

All the European codes are unanimous in that the attempt is subject to penalty. They differ, however, in attaching various degrees of punishment to various degrees of attempt. The Article 2 of the French Code provides that the attempt at a major crime, discontinued involuntarily, is to be treated as an accomplished crime.[2] The Belgian, German and some other codes punish the attempt, even involuntarily interrupted, more mildly than

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[1] The Yugoslavian Code has the principle of impunity of preparation expressed as follows:

"SEC. 32. Paragraph 3. Preparatory activities shall not be punished except for cases expressly stated in law."

[2] *French Code* (as amended in 1832):

"ART. 2. Any attempt at a major crime manifested through the start of execution which was suspended or failed to achieve the effect because of circumstances independent of the will of the offender shall be considered as the crime itself."

the accomplished crime and provide for further leniency in case the attempt was discontinued voluntarily.'

' *Definitions of Attempt.*

A. *Belgian Code*

"SEC. 51. An attempt is punishable if the determination to commit a major or minor crime was manifested by external acts constituting a start in execution of such crime which was discontinued or failed to produce the effect because of circumstances independent of the will of the offender.

"SEC. 52. Attempt at a major crime shall be punished by a penalty immediately inferior to that established for the crime itself in accordance with Secs. 80 and 81."

B. *German Code*

"SEC. 43. Anyone who has manifested a determination to commit a major or minor crime by any act which constitutes a commencement toward execution of such crime shall be punished for the attempt, if the major or minor crime has not been completed.

"The attempt to commit a minor crime is, however, only punishable in those cases in which the law expressly provides therefor.

"SEC. 44. An attempt at a major or minor crime shall be punished more mildly than an accomplished crime.

"SEC. 46. Any attempt is not punishable if the offender: (1) Gives up the execution of the contemplated act without having been prevented from such execution by a circumstance beyond his control; (2) Prevents by his own act, the accrual of the effect constituting the criterion of a major or minor crime before his activities were discovered."

C. *Swiss Code of 1939.*

"SEC. 21. He who started the execution of a major or minor crime but did not bring his criminal activity to a consummation may be punished more mildly (Art. 65).

"If the offender withdrew from consummation of criminal activity on his own accord, the court may abstain from imposing penalty for attempt."

However, with regard to some crimes whose definitions evolved from the concept of treason, modern codes are again unanimous: An attempt is treated equally with the accomplished crime as far as the penalty is concerned. Furthermore, the mere preparation to such crimes is also punishable.

In the codes this principle was expressed by two methods: either it was definitely stated that the attempt at a certain crime is to be punished as an accomplished crime,[10] and the mere preparation is

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D. *Polish Code of 1932.*

"ART. 23. Sec. 1. One shall be responsible for attempt who, with the intention to execute an offense undertakes activities immediately designed for realization of this intent but does not accomplish the contemplated offense.

"ART. 23. Sec. 2. An attempt is considered also where the offender does not know that the accomplishment was impossible because of lack of object suitable for the commission of the intended offense, or because of a use of such means as are unsuitable to produce the intended consequences."

E. *Yugoslavian Code of 1931.*

"SEC. 31. Whoever started the execution of an intentional offense but did not accomplish it shall be punished in case of a major crime and in case of a minor crime, only where the law prescribes so.

"SEC. 32. The offender may be punished for an attempt more mildly than for an accomplished crime."

The Yugoslavian Code authorizes the judge to abstain from the imposition of a penalty in case of an attempt with unsuitable means. (Sec. 32, para. 2, Sec. 33.)

[10] *Belgian Code (as amended in 1916).*

"ART. 115. The following shall be punished by death:

(3). One who facilitates the enemy of the country to enter the territory of the kingdom . . .

(4) One who seconded the progress of the enemy's armed forces on the territory of the kingdom or against Belgian land or naval forces by undermining

punishable," or the definitions of individual crimes were couched in such terms as to include activities which normally would be regarded as mere attempt or preparation. It may be stated that ordinarily the motion of an accomplished crime presupposes that a certain external effect was

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the loyalty of the officers, soldiers and sailors as well as the citizens towards the King and the country.

(5) In the above-mentioned cases a *punishable attempt shall be punished equally with the crime itself.*

(6) A conspiracy for the purpose of the commission of any of the crimes specified in this article shall be punished . . .

French Code

"ART. 87. Attack [*l'attentat*], the purpose of which is to destroy or change the government . . . shall be punished . . . (This text is as amended in 1853).

"ART. 88. The execution, as well as, the attempt [*tentative*] constitutes equally an attack [*l'attentat*].

"ART. 83 (as amended in 1939). Attacks on the exterior security of the state, if committed during the time of war, shall be punished with hard labor for a period defined by the court . . . Attempt at a minor crime shall be punished as the crime itself.

German Code

"ART. 82. Any act directly tending to the carrying out of an intention shall be regarded as an undertaking by which the crime of high treason is completed.

"ART. 86. Every other act in preparation for a treasonable undertaking shall be punished with hard labor or confinement in a prison or fortress not to exceed three years. If there are extenuating circumstances, the punishment shall be from six months to three years."

Polish Code

"ART. 96. Whoever makes preparations for the commission of offenses defined in Articles 93, 94, or 95 shall be punished by imprisonment not to exceed ten years."

caused by the act of the offender. Murder is accomplished when the death occurs, larceny when the possession of a thing is gained from another. But the definitions of many crimes belonging to the group of offenses against the external security of the country in particular do not specify any external effect as a criterion of an accomplished crime. Thus, some codes use the very word "attempt" in defining such crimes.[12] Others in de-

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This is not the only kind of preparation which is punished under the Code. Under Art. 218, penalty of imprisonment not to exceed five years shall be applied to preparations for:

Causing danger of fire, flood, collapse of a building, of catastrophe in traffic, or land, water or air (Art. 215);

Causing a public danger to human life or health or serious damage of property by use of explosives, inflammable materials, or geysers (Art. 216);

Causing public danger to human life or health or serious damage to property:

(a) by damaging or misusing the installation of utilities such as installations supplying water, light, heat, or power, protective installations in mines and factories; or

(b) by dissemination, or by obstructing the combatting of all human, animal or vegetable contagion;

(c) by other activities under circumstances of special danger (Art. 217).

[12] *Polish Code*

Thus Art. 93 states:

"SEC. 1: Who attempts to deprive the Polish State of independent existence or to detach part of its territory shall be punished by imprisonment for not less than ten years, or for life, or by death."

Consequently, here the mere attempt is declared to be an accomplished crime. The attempt is defined in Art. 23 as quoted in note 9.

The Commentary to the Polish Code states precisely that

scribing the indicia of accomplished crimes use terms synonymous with attempt such as "whoever seeks," "undertakes," "endeavors."[13] Thus certain activities appear as offenses that did not result in any particular external effect.

Consequently, modern European penal codes require an overt act be committed if the penalty is to be imposed, but the concept of an overt act, with regard to the crimes of a treasonable nature, is stretched. This was caused, not by the desire to combat political opposition within the country but by the necessity of its protection from without. The courts being bound in criminal cases by the doctrine of *nullum crimen sine lege*, it resulted in an amendment of legislation adding more detailed statutory provisions and placing under penalty several specific activities which one may consider subsidiary to treason. Consequently to ascertain what is the equivalent of an "overt act" in European law with regard to treason, it is necessary to go over a number of sections and articles of the criminal codes describing a variety of activities which though not technically called treason, do belong nevertheless to the crimes against the external security of the State and which as a whole took the place of treason or *lèse majesté* of the olden times.

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the word "attempt" is used in Art. 93 in this technical sense (Peiper, *Komentarz Do Kodeksu Karnego*, 1933, p. 293).

[13] The French Code, as amended in 1939, in describing various treasonable crimes uses in Art. 80, the term "d'atteinte" which is very close to "attempt" or "entrepris"—"whoever undertakes."

The Belgian Code, in Art. 101–106, uses the term "l'attentat" which may be translated as an attack or attempt.

The provisions concerning these specific crimes which may be called aid to treason in a broad sense establish more lenient penalties than for treason. On the other hand, they bring under such penalties activities which have a minimum result and minimum criminal intent. This raises the problem of the internal element of an offense—the intent.

B. *Offense as a manifestation of a criminal design.*—The treasonable purpose of activities continues to be a criterion of major crimes against the external security of the State.[14] But minor crimes of this group are so defined as to meet certain activities with penalty regardless of the purpose or motive of the perpetrator. Here the intent does not have to be directed towards a harm or prejudice to the integrity of the country or national defense. It is sufficient if it covers the very activity which is specified in the statute. They may be called formal crimes, because the mere fact of such activities is sufficient for a penalty. The intent required is restricted to this activity alone. As an example, Art. 105 of the Danish Code of 1930 or Art. 100 of the Polish Code may be used as illustrations.[15]

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[14] For instance, the Belgian Code, Art. 114, penalized contact with a foreign power "for the purpose of inducing such power to undertake a war." The same terms are used in Art. 75 of the French Code as amended in 1939.

[15] *Danish Penal Code*

"SEC. 105. One who commits an act by virtue of which a foreign service of military intelligence is set up, or who assists directly or indirectly in its functioning on the territory of the State of Denmark, shall be punished by

Moreover some of these crimes consist in inactivity, i. e., in an act of omission. Loyalty to the country imposes the duty of its active protection. Failure to do so is a breach of duty by a citizen and results in penalty. France may be used as an interesting example of such legislation.

The French Criminal Code as originally promulgated in 1810 imposed upon every citizen the duty to report to the authorities any committed or contemplated crime against the internal or external safety of the state which came to his knowledge. Failure to comply with this duty was a crime by itself (misprision). This subject matter was dealt with in Articles 103–108 of the Penal Code. However, in 1832 these sections were repealed. But when, in 1938 and 1939, the provisions concerning espionage and treason were revised these sections were filled with a new text by the decree of July 29, 1939. This new text in parts

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imprisonment up to two years and in cases of extenuating circumstances by detention."

Polish Code

"Art. 100. Sec. 1. Whoever in time of war acts in favor of the enemy or to the damage of the Polish armed forces or allied forces shall be punished by imprisonment not under ten years or for life.

"Art. 100. Sec. 2. If the offender unintentionally acted, he shall be punished by imprisonment not to exceed three years or by detention not to exceed three years."

The above-mentioned commentator (Peiper) comments that for application of this section "No understanding with the enemy is required and activities for his favor may take place either by joining him with arms or by diverse acts—aid in money, for instance by subscriptions to the enemy's war bonds." *Op. cit. supra*, note 23, at 310.

repeated the old provision, antecedent to 1832 and in other parts introduced new rules. The translation of both the new and the old text is appended.[16]

[16] French Code (1810, abrogated in 1832).

"ART. 103. All persons having the knowledge of conspiracies [*complots*] formed or crimes contemplated against the internal or external safety of the State who fail to report these conspiracies or crimes and do not disclose to the Government, to the administrative authorities, or agencies charged with the investigation of crimes (*Police Judiciaire*) all circumstances which came to their knowledge, all this within 24 hours immediately following the moment when the knowledge was acquired, shall be punished, even if they are found free from any complicity, for the mere fact of non-reporting in a manner and in accordance with the distinction hereinbelow stated.

"ART. 104. If the crime of lèse majesté is involved everyone who in the case provided for in the preceding article failed to make the report there prescribed shall be punished by imprisonment.

"ART. 105. With regard to other crimes and conspiracies mentioned in the present chapter, every person who failed to make reports prescribed by the Art. 103 upon receipt of knowledge shall be punished by imprisonment from two to five years and fine from 500 francs to 2,000 francs.

"ART. 106. One who acquired knowledge of the abovementioned undisclosed crimes and conspiracies cannot offer as an excuse the fact that he did not approve these or even has opposed them and tried to persuade the perpetrators not to commit them.

"ART. 107. Nevertheless, if the perpetrator of the conspiracy or crime is the husband, even divorced, ascendant or descendant, brother or sister, or a person relative by marriage in the same degree, of the person charged with misprision, the latter shall not be submitted to the penalties stated in the preceding articles. However, such person may be put by order or judgment under special surveillance of high police for a period not to exceed ten years.

This amendment seems to express the general tendency of modern democracies to protect the

"ART. 108. Penalties provided for against the perpetrators of conspiracies and other crimes against the exterior and interior safety of the State shall not be applied to those offenders who, before the execution of or attempt at the said conspiracies and crimes and before any prosecution started, have at first given to the authorities mentioned in the Art. 103 information concerning such conspiracies and crimes, their perpetrators or accomplices, or who even after the prosecution started caused the arrest of the said offenders and accomplices.

"Offenders who have reported information or have caused the arrest may be, nevertheless, condemned to remain for life or for a period of time under the surveillance of the high police."

French Code of 1939.

"ART. 103. Whoever, knowing about the plans of an act of treason or espionage, does not report them to the military, administrative, or judicial authorities as soon as he acquired knowledge shall be punished by penalties provided by Art. 83 for the attack on the exterior safety of the State.

"ART. 104. The same penalty shall be applied to every person who, being in a relation with a person engaged in activity prejudicial to the national defense, did not inform the authorities stated in the preceding article upon the moment when he became aware of these activities.

"ART. 105. One shall be exempt from such penalty who, before the execution of or attempt at a major or minor crime against the interior or exterior safety of the State, shall give the first information to the administrative or judicial authorities.

"ART. 106. The exemption from the penalty shall be in the discretion of the court if the denunciation is procured after the consummation of or attempt at the major or

exterior safety of the country at the expense of some liberal doctrines of the 19th century.

3. *Aid and Comfort*

The partnership in crime with regard to the crimes against the external safety of the State comes in many European criminal codes under special rules. European doctrine distinguished between the accomplice, that is an aid to the perpetrator of a crime, and the harboring of the criminal or objects obtained through a crime. The main difference between the two categories is that in the first instance the aid must precede the crime; in the second it is an activity aiding in the concealment of the crime committed. Consequently, for ordinary crimes no harboring of a future or intended criminal would come under any penal provision.

But many codes carry the provisions which establish a specific crime for activities which might be called mere harboring of persons who are on the way to commit a crime against the external safety of the state. *See* French Code, Sec. 83, original text and Sec. 85 as amended in 1939.

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minor crime, but before the beginning of the prosecution.

"ART. 107. The exemption from the penalties shall be also in the discretion of the Court with regard to perpetrators who after the beginning of the prosecution cause the arrest of offenders and accomplices of the same offense or of another offense of the same nature and the same importance.

"ART. 108. Those who shall be exempt from the penalties by application of the preceding articles may be nevertheless prohibited to stay in certain places for a period of five to twenty years."

as well as the Danish, Belgium and Norwegian provisions."

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[11] *Harboring*

A. French Code.

"ART. 83 (prior to 1939). Whover shall harbor or cause others to harbor spies or enemy soldiers sent for scouting, if he knew who they were, shall be punished by death."

This article was amended in 1939 and became Art. 85.

"ART. 85 (as amended on July 29, 1939). Besides persons designated in Art. 60 and 460, every Frenchman and every foreigner shall be punished as an accomplice or for harboring:

(1) Who, knowing the intentions of the perpetrators of major crimes and minor crimes against the exterior safety of the State, furnishes them subsidies, means of existence, lodging, place of asylum or meeting place.

(2) Who, knowingly carries the correspondence of the perpetrators of a major or minor crime or knowingly facilitates them in any manner whatsoever in finding, harboring, transporting, or transmitting, the objects of a major or minor crime;

(3) Who harbors knowingly the objects or instruments which served or should serve for the commission of the crime or offense or material objects or documents obtained through a crime or offense.

In a case contemplated by Section 248 the Court may free from punishment persons designated in that section who did not participate in the crime or offense in any other manner.

"ART. 61. All those who, knowing the criminal conduct of offenders engaged in brigandage, or violence against the safety of the State, public peace, persons or property, habitually furnished them with a lodging, place of asylum or a meeting place shall be punished as their accomplice.

"ART. 60. Those shall be punished as accomplices of an act qualified as major crimes, or minor crimes who incited for this act by gifts, promises, menaces, abuse of authority or power by machinations or guilty artifices, or gave the instructions for its execution;

It remains to be mentioned that under the law of most European countries, intent is defined not only

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"Those who procured arms, instruments and all other means which served for the commission of the crime knowing that they were to be used;

"Those who knowingly aided or assisted the offender or the offenders in acts which they have prepared or facilitated or consummated, this all without prejudice to the punishment specially provided for by the present Code against the perpetrators of conspiracy or incitement to acts attempting at the interior or exterior security of the state in the case when the crime contemplated by the conspirators or inciters has not been committed.

"ART. 460 (as amended on May 22, 1915). One who knowingly harbors entirely or in part things carried away, embezzled, or obtained by means of a major or minor crime shall be punished by penalties stated in Art. 401.

"Fine may be increased over 500 francs up to half of the value of the object harbored.

"This all without prejudice for more severe penalties applicable in case of complicity in conformity with Art. 59, 60, and 61.

"ART. 248. One who harbors or causes another to harbor persons whom he knows have committed crimes entailing heavy penalties shall be punished by imprisonment not to exceed two years, but not less than three months.

"From these provisions shall be exempt the ascendants and descendants, husband or wife, even if divorced, brothers and sisters of the harbored criminal, or their relatives by marriage in the same degree."

B. *Danish Code* (see note 15).

C. *Belgian Code*

"ART. 120⁴. Attempt at one of the offenses provided for in Art. 116, 119, 120 and 120³ shall be considered as an accomplished offense itself.

"ART. 120⁷ (as enacted on July 19, 1934). Without prejudice for the application of Art. 66 and 67, anyone shall be punished by imprisonment from eight days to six months and fined from 26 to 500 francs who, knowing the

as a direct will to commit a given crime (*dolus directus*) but also as an acquiescence with the

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intention of authors of an offense provided for by Art. 120 and 120²; or of an attempt at one of these offenses, furnished them with lodging, place of asylum or meeting place, received or transmitted their correspondence or harbored the objects or instruments which served or should have served for the commission of the offense.

"ART. 121 (as amended in 1916). Anyone who harbors or causes others to harbor spies or enemy soldiers sent for reconnaissance, knowing who they are, shall be punished by death.

"Anyone who harbors or causes others to harbor enemy agents or soldiers in good health or wounded, or who comes to their aid in order to escape the military authorities, shall be punished by imprisonment from six months to five years and by fine from 500 francs to 5,000 francs.

D. *Norwegian Code*

"ART. 87. Anyone shall be punished either by detention or imprisonment up to four years who in time of war unlawfully: (1) Refuses to supply a military commander with information which the latter needs on circumstances of importance for the conduct of war, or who induces others to refuse, or (2) Harbors enemy spies, receives them or otherwise comforts them, or (3) Incites others to commit any offense punishable under the military penal law with imprisonment for a period of three years or with a heavier penalty."

Accomplice

A. *Belgian Code*

"ART. 67. The following shall be punished as accomplices * * *

"Those who gave instruction for the commission.

"Those who procured arms, means, or instruments which were used in the major or minor crime knowing that such a use would be made of them.

"Those who, outside of the cases provided for in paragraph 3 of Art. 66, having knowingly aided or assisted the perpetrator or perpetrators of the major or minor crime

criminal effect as a possible result of the act of the offender (*dolus indirectus seu eventualis*)."

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in the act which they have prepared or facilitated or which they have consummated."

B. *Swiss Code*

"ART. 25. Whoever intentionally renders assistance for a major or minor crime may be punished more mildly."

C. *Polish Code*

"ART. 27. The person is guilty of aid who gives aid by act or word in the commission of the offense."

D. *German Code*

"ART. 49. Anyone who has by word or action knowingly given assistance to an offender in the commission of a major or minor crime shall be punished as an accomplice."

Intent

A. *Polish Code*

"ART. 14. An intentional crime arises not only where the offender desires to commit it but also where he foresees that the criminal effect may occur, or, that his act may acquire a criminal character and nevertheless agrees with it.

B. *Yugoslavian Code*

"ART. 16. An offense is committed intentionally whenever the offender wanted its consummation or when he has foreseen the prosecuted effect which could arise from his action and agreed to its arising, regardless of whether he wanted it or not."

C. *Swiss Code* (1939)

"ART. 18. . . . a person commits a major or minor crime intentionally if the offense is executed knowingly and wilfully.

"One commits a major or minor crime by negligence, if by culpable carelessness he acts without taking into account or without thinking of the consequences of his act. The carelessness is considered culpable where the perpetrator does not use the precautions required by the circumstances or by personal condition."

Consequently, if a continental European lawyer is faced with the task of the prosecution of treasonable activities, he does not have to enter into the interpretation of broad concepts or broad terms such as treason, overt act, etc. The criminal codes offer a large number of specifically defined activities which come under the penal law. His task would be to select the most suitable definition available and formulate his charge accordingly.

He may also avail himself of such concepts as attempt, complicity, or indirect intent to bring within the provisions of the Statute activity auxiliary to the crime committed or contemplated.

Thus the whole system of criminal law of continental European countries presents a series of concepts which do not fit common law exactly. It is questionable as to whether the analysis of the criminal law of these countries may be helpful in the interpretation of an American Statute or Constitution except on one point. The recent amendments to criminal legislation introduced in the democracies such as France, Denmark, and Norway show an unquestionable broadening of the concept of aid to a spy. (*See* Articles quoted in notes 15 and 17). Thus stronger protection of the country by means of criminal law against attacks from without seems to be compatible with the protection of liberty and civil rights.

III

THE TWO-WITNESS REQUIRMENT IN CANON LAW*

The present writer has been asked to investigate whether analogies from Canon law may be helpful in the construction of art. III, sec. 3 of the American Constitution. The questions briefly answered in this memorandum are: (1) Which policy led the Catholic Church to the establishment of the "two-witnesses" rule? (2) Are there any special reasons or modifications expressed for this rule in canonical trials for heresy? (3) How is the said rule construed in cases in which the testimonies of the two witnesses are overlapping with regard to the several phases of a given criminal act? (4) Do the doctrines developed by Canon law in the crime of heresy elucidate the concept of, and the manner of proof required for, an "overt act" of treason?

Ad 1. The "two-witnesses" rule is one of the oldest elements of canonical procedure. It has been stated repeatedly since early times by statute, judicature, and authorities as a general principle of evidence in all matters, both contentious and criminal. It is ultimately based on the scriptural text: "Take with thee one or two more so that on the word of two or three witnesses every word may be confirmed" (Mat. xviii, 16). The maxim, *unus testis nullus testis,* is considered a self-evident truth. Almost the same reasoning

*Prepared by Dr. Stephan G. Kuttner, Professor of the History of Canon Law, The Catholic University of America, Honorary Consultant in Canon Law, Library of Congress.

as voiced on the occasion of framing the Constitution of the United States is frequently expressed by canonical authorities: there will rarely be two perjured witnesses in whose testimony a prudent judge would not find flaws and contradictions (the case of Susanna, *Dan*, xiii, is always cited as classical example), while the full convergence of the observations made by two persons has the almost irrefutable presumption of truth in its favor. Exceptions from the two-witnesses rule are admitted only in some very special cases (e. g. in certain crimes committed by a priest in the act of hearing confession) and may not be extended. Another kind of exception is prompted by the qualifications of certain types of witnesses. Thus the deposition of one public official of unquestionable standing, when he testifies on any subject of which he has information or knowledge *ex officio*, is considered sufficient evidence (*Codex iur. can.* 1781 § 1).

Ad 2. The said rule has always applied to cases of heresy—if the latter may be considered, to some extent, an ecclesiastical analogy to treason—without modification. I have not found any special reason advanced for this application, since it needs no special justification in those cases.

Ad 3. In the field of evidence, an old distinction made by Canon law is that between "full" and "half-full" evidence (*Probatio plena* and *semiplena*). The latter kind of proof is that which needs corroboration by additional, circumstantial evidence. While two fully concording witnesses furnish full proof, certain rules have

been developed for the appreciation of so-called *testes singulares*, i. e. several witnesses whose depositions, however, do not cover the facts in question all to the same extent. Authors distinguish: (a) adversative differences, (b) cumulative differences, (c) diversificatory differences. Of these three, "adversative" differences between two or more witnesses consist of open contradictions on the same issue of fact, while "diversificatory" differences are had when one witness testifies to a different set of facts than the other, and the two sets of facts cannot by unimpeachable logical operation yield a valid conclusion (e. g. witness I testifies to having sold a distilling apparatus to the defendant, witness II to having purchased liquor from the defendant: no full proof is given that the latter has made illegal liquor).

While these two types of *testes singulares* may be disregarded for the present purpose, the remaining category is of more interest. A "cumulative" difference is had where two or more persons testify to different acts *which are coherent parts or phases of a whole*, by complementing each other or by tending towards the same end. E. g. witness I has seen the defendant loading a gun and aiming, witness II has heard the detonation of the shot: both together may sufficiently prove the act of shooting. Or witness I has seen the plaintiff plowing a field, witness II has seen him sowing some days later, witness III has seen him still later reaping the harvest: this may be sufficient evidence that the plaintiff was in bodily possession of the field. In other words, several

"singular" witnesses in the case of a merely "cumulative" difference are considered by Canon law as sufficiently complying with the two-witnesses rule, except where any factual or logical link in the chain of their observations is missing. (See Schmalzgrueber, *Jus ecclesiasticum*, book II, part III, title 21, §§ 105–6; Cardinal M. Lega, *De iudiciis ecclesiasticis*, vol. I, no. 481; but for cautious application of the doctrine in criminal cases, *id.* vol. IV, num. 222.)

Ad 4. The question whether, to constitute an "overt act" of treason, the treasonable intention must be manifest in the act itself, or may be inferred from actions, utterances, etc., other than the overt act but illustrating the same, can receive no elucidation from the analogous delict of heresy in Canon law. The reason is that Canon law has always followed rules different from Common law with regard to the evidence required for intention in crimes and delicts. One basic rule is that, after the external facts of a crime have been proved, there exists a presumption for the presence of malicious intention (dolus) with the defendant (cf. *Codex iur. can.* 2200 § 2). The burden of proof for the absence of intention therefore rests with the latter. On the other hand, the proof of subjective innocence (absence of full intention) is often made very easy to the defendant (cf. *Codex iur. can.* 2229 § 2), in order to counterbalance the jeopardy entailed by the previous rule. Such fundamental differences make that the construction of treason in American law can, in the opinion of this writer, derive no support from anything analogous in Canon law. This

also holds true for any comparison between "giving aid and comfort to enemies" (Constit. art. cit.) and the crime of knowingly and willingly giving aid to an heretic (*Codex iur. can.* 2316). Here too, the rules of evidence differ because of the *praesumptio doli* once it is established that the supporter has given the aid.

APPENDIX B*

ANGLO-AMERICAN MATERIALS

INTRODUCTION AND BIBLIOGRAPHICAL NOTE

(a) OVERT ACT AND INTENTION IN TREASON

Etymologically, "treason" has always meant a breach of faith or loyalty. In Anglo-American law, it has meant, in general, the betrayal of allegiance owed a political sovereign. Allegiance in this sense may be based either on citizenship, or, ("local allegiance"), on presence in the sovereign's territory, accepting the benefit of the sovereign's protection. The precise definition of the allegiance, the breach of which constitutes treason, has been the subject of much ancient learning. The present inquiry, however, has focussed on two matters which have received less careful analysis: the definition of the intent and act elements in the crime of treason and a consideration of their mutual relationship.

The allocation of emphasis in the following essays has been determined by the relative, practical value of the historical sources rather than by

*Appendix B, with the exception of the section on English case law prior to 1790, was prepared by Willard Hurst, on leave as Associate Professor of Law, University of Wisconsin. The materials under the heading of English case law prior to 1790 were collected and prepared in the first instance by attorneys on the staff of the Department of Justice, and revised and edited by Mr. Hurst.

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adherence to logical symmetry. There is historic logic in beginning with the English materials, because American policy was derived from American ideas concerning the meaning of English experience as well as American professional familiarity with English statutes, and treatises. On the other hand, no effort is made to relate all the ramifications of the English law; instead, attention is put on those aspects of the English material which evidence indicates were most significant to Americans, or which best illuminate the development of the branches of treason which concerned American law. Thus, there is placed first an analysis of the accounts of "treason" given in the great English law treatises prior to the adoption of the United States Constitution. This is both because only in the treatises do we find any careful effort to analyze the policy and the elements of the crime, and because the Americans obtained their knowledge of the English law and experience primarily from the treatises. English policy attitudes towards the major branches of treason are brought up to date in a brief summary of 19th and 20th century writings. Granting always the fundamental importance of the Statute of 25 Edward III to all sources on the law of treason, a discussion of the English statutory material may properly follow that regarding the treatises, since the statutory evolution contributes little to explicit analysis of the crime, but is of significance for the somewhat ambiguous threads of policy appearing in it. Somewhat surprisingly, the case materials deserve only third rank in value; the impressive volumes of the State Trials contain a maximum of pleadings, tedious

testimony and records of executions, and a minimum of helpful analysis of the policy and elements of the crime. Moreover, one famous case after another proves, on careful examination, to be so interwoven with the peculiar politico-religious motives and pressures of its time as to be of little value beyond furnishing cumulative evidence that careful and realistic definition of the crime is necessary if it is not to be readily abused as an instrument of faction. Finally, there is little satisfactory evidence that Americans had access to, or extensive knowledge of the records of the English trials, as distinguished from their familiarity with the basic English statutes and treatises.

Prior to the framing of the Constitution, the principal development of the law of treason in this country was through legislation, and analysis of the colonial and state statutes before 1787 thus forms the bulk of the first essay on American materials. There follows an examination of such discussions of the treason clause as occurred in connection with the framing and ratification of the Constitution. Subsequent developments in state constitutions and in Federal and state legislation follow the model of the Philadelphia Convention so closely that no separate discussion of these sources has seemed profitable. Analysis of American materials is, therefore, concluded with detailed examination of Federal and state court decisions after 1790. Though few in number, and limited in the range of their exploration of issues, the American cases contain suggestive implications regarding the scope of "treason",

and they take on further interest because an unusually high proportion of the opinions involved were rendered by members of the Supreme Court of the United States presiding as Circuit Justices.

(b) BIBLIOGRAPHICAL NOTE

(1) English Material

Selection of treatises for emphasis was determined primarily by the evidence of those most cited in English cases and in American constitutional and case material. Search was made of subsidiary English treatise material available in the Library of Congress, sufficient to assure that the basic books were properly relied on as giving the important outlines of English legal analysis of the crime. Guidance was had from Winfield, *The Chief Sources of English Legal History* (Cambridge, Mass. 1925) and Jelf, *Where To Find Your Law* (3d ed. London, 1907.) Statutory development was checked through Halsbury's Laws of England and Holdsworth. As the basis for study of English decisions, Howell's *State Trials* were paged, volume by volume; and this search was supplemented by examination of the Law Reports.

(2) American Colonial and State Material

Colonial charters, proprietary grants, and colonial and state "Fundamental Articles" and constitutions for each of the original 13 states were examined in Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (7 vol. Government Printing Office: Wash-

ington, 1909). Instructions to royal governors were checked by means of Labaree's collection (Labaree, *Royal Instructions to British Colonial Governors*, 1670–1776. (2 vol. N. Y. 1935). Royal surveillance of the action of colonial legislatures and executive and judicial agencies under these fundamental legal documents was observed through published records of the Board of Trade and the Privy Council, in the light of the commentaries by Hazeltine, Russell, Schlesinger, and Washburne, cited in the footnotes.

Search was made for all legislation relevant to the offense of treason and related crimes, passed in each of the 13 original states from the earliest records available through 1790, and in Vermont from its separation from New York in 1776 through 1790. For this purpose, each collection, compilation and revision of the statutes of each colony and state published in the indicated period was examined. Full coverage was assured by checking the search against the Babbitt bibliography of American legislative materials, [Babbitt, *Hand-List of Legislative Sessions and Session Laws, Statutory Revisions, Compilations, Codes, etc., and Constitutional Conventions of the United States and Its Possessions and of the Several States to May, 1912.* (State Library of Massachusetts. Boston, 1912)], and wherever gaps appeared, or wherever the compilations indicated the omission of possibly relevant, repealed, expired or obsolete statutes, resort was had to the volumes of session laws. Because of the variations and unreliability characteristic of statutory indexing, the index to each volume was checked item by item, and in numerous cases where the

indexing was more than usually poor, the volumes were paged. The state of the materials and the available tools for their use is such that some pertinent materials have undoubtedly been missed, but it is believed that the search has been close enough to reveal any material of major consequence.

The Century Digest indicates no recorded decisions in treason cases prior to 1790, except the handful of Pennsylvania cases in the volumes of Dallas. As a cross-check, however, all volumes of American decisions for this period, as listed in Hicks, *Legal Research* (Rochester, 1942) were examined. There were scattering prosecutions for treason in the various colonies and states which were not recorded in the law reports. In addition to Wharton's *State Trials of the United States* (Philadelphia, 1849), and Lawson's *American State Trials* (17 vol. St. Louis, 1916–1926), the local history collections in the Library of Congress were checked for such evidence as could be found of the character of these trials.

The literature of early colonial and state legal history has been examined. Particular attention was given to discussions of problems involved in the reception of the common law in the United States, and to the question of the extent to which English statutes, decisions and treatises were available to American lawyers and statesmen. To the extent that time allowed, the legal materials were placed in a broader frame of reference by resort to standard histories, especially Channing, *History of the United States*, Andrews, *The Colonial Period of American History*, Osgood, *The*

American Colonies in the Seventeenth Century, Beard, *The Rise of American Civilization,* and Morison and Commager, *The Growth of the American Republic.*

(3) *The Confederation*

Check was made of the Declaration of Independence, the Articles of Confederation and the "Ordinance of 1787 for the government of the territory of the United States northwest of the river Ohio". *The Journals of the Continental Congress* (Government Printing Office: Washington, 1930) were examined, volume by volume, as well as Burnett's *Letters of Members of the Continental Congress* (Washington, 1921), and his history, *The Continental Congress* (N. Y. 1941). Legislation of the Northwest Territory, as published by the Illinois State Historical Library, was also checked. Standard works already noted in the search of colonial and state material were of course pertinent.

(4) *The Constitution*

For the Philadelphia Convention, and its sequel, the basic sources are, of course, Farrand, *The Records of the Federal Convention of 1787* (New Haven, 1937), *The Federalist* (Lodge ed., N. Y. 1902), and Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. Washington, 1854). Farrand brings the material on the Federal Convention satisfactorily up to date. Elliott was supplemented by the monograph material on the various state conventions, the most important of which is

McMaster and Stone, *Pennsylvania and the Federal Constitution* (Philadelphia, 1888). *The Federalist* was complemented by the two collections of polemical pamphlets on the ratification of the Constitution, edited by Paul Leicester Ford. The history of the first treason act (Act of April 30, 1790, Ch. IX, 1 Stat. 112) was checked in the *Annals* of Congress and in the *Journal* of Senator Maclay (Harris ed. Harrisburg, 1880).

In search of material which might cast light on the views of policy held by leading figures of the Constitutional period, an examination was made of the published papers and all standard biographical material in the Library of Congress of John Dickinson (Pennsylvania), Oliver Ellsworth (Connecticut), Benjamin Franklin (Pennsylvania), Alexander Hamilton (New York), James Iredell (North Carolina), Thomas Jefferson (Virginia), William Johnson (Connecticut), Rufus King (Massachusetts), James Madison (Virginia), George Mason (Virginia), Gouverneur Morris (Pennsylvania), James Paterson (New Jersey), Charles Pinckney (South Carolina), Edmund Randolph (Virginia), John Rutledge (South Carolina), Roger Sherman (Connecticut), Richard Dobbs Spaight (North Carolina), George Washington (Virginia), James Wilson (Pennsylvania) and George Wythe (Virginia). Because internal evidence suggested that these men had particular interest in the drafting of what became the standard American definition

of "treason", especially detailed search was made of the papers of Thomas Jefferson and James Wilson. The cooperation of the State Library, Richmond, was enlisted regarding the first, and the Wilson papers in the Pennsylvania Historical Society were examined in connection with the second. Force's *American Archives* were used as a general cross check in this field of inquiry. Certain leading American legal works in the first generation of the Constitution or of the immediately preceding period were referred to for further evidence of the climate of opinion, notably Kent's *Commentaries*, Tucker's *Blackstone*, and the constitutional treatises of Rawle, Sergeant and Story.

(5) American Material After 1790

Convenient, recent lists of state constitutional and statutory provisions on treason will be found in Sen. Doc. No. 173, 57th Cong., 1st Sess. (1902), 7 Wigmore on *Evidence* (3d ed. Boston, 1940) sec. 2039, p. 272, n. 2, and in *Constitutions of the States and United States* (New York State Constitutional Convention Committee, Albany, 1938) (index heading, "Treason"). Search for cases was made through all regular channels, supplemented by the Wharton and Lawson *State Trials* collections, as well as by standard works on American history, already referred to, and by a search of the bibliographies of United States government documents. Biographical material dealing with central figures in notable trials was examined so far as available.

I

TREASON IN ENGLAND

1. TREATISES

(*a*) *Early English Treatises*[1]

Significantly, there is no word of any policy restrictive of the scope of "treason" in the brief definitions and discussions of the early books (Glanvill, Bracton, Britton, Staundford). The

[1] The following are the treatises referred to herein (in chronological order):

Glanvill, De Legibus et Consuetudinibus Regni Angliae (c. 1187–1189) (1) edited by George E. Woodbine (New Haven, 1932); (2) translation by John Beames (Washington, 1900).

Bracton, De Legibus et Consuetudinibus Angliae (c. 1250–1258): (1) edited by George E. Woodbine (4 vol. New Haven, 1932 ff.); (2) translation by Sir Travers Twiss (6 vol. London, 1879).

Fleta (c. 1290) (London, 1647).

Britton (c. 1290). (Nichols, ed. 2 vol. Oxford, 1865).

Fortescue, De Laudibus Legum Angliae (c. 1470) (Chrimes, ed. Cambridge 1942).

Staundford, Les Plees del Corone (1560). (London, 1607).

Coke, Institutes of the Laws of England, Third Part (5th ed. London, 1671).

Hale, History of the Pleas of the Crown (2 vol. Emlyn, ed. London, 1736–1739). (All citations herein are to vol. 1.)

Kelyng: A Report of Divers Cases in Pleas of the Crown, Adjudged and Determined in the Reign of the late King Charles II, etc. Collected by Sir John Kelyng, K^t. (London, 1708) (3d ed., London, 1873).

Hawkins, A Treatise of the Pleas of the Crown or A System of the Principal Matters relating to that subject,

crime is simply set forth in positive terms, looking to the interest in the security of the king and his authority.[1] Staundford notes that the Statute of Edward III asserted the need for resolving the uncertainties of the common law regarding the extent of the offense, but he does not feel impelled to add any special words of praise for the endeavor.[2] Appropriately, the new emphasis on safeguarding the liberty of the subject first appears in Coke. His discussion is not wholly consistent in this respect,[3] and in one instance especially, he avows a principle of liberal construction in favor of the king:

> This compassing, intent, or imagination, though secret, is to be tryed by the peers, and to be discovered by circumstances precedent, concomitant, and subsequent, with all endeavour everinore for the safety of the King.[4]

This is said, however, with reference to the most vague and precautionary head of the Statute, which is pointedly omitted in the restrictive terms

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digested under proper heads (1716) (7th ed. 4 vol. London, 1795).

Foster, A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746 in the County of Surry; and of other Crown Cases (1762) (3d ed. London, 1792).

Blackstone, Commentaries on the Laws of England (4 vol. Oxford, 1769). (All citations herein are to volume 4).

[2] Staundford, Lib. 1, Cap. 2, 1–0.

[3] Note his emphasis on the declaratory aspect of the Statute, and his unquestioning acceptance of the doctrine that in treason all are principals. Coke, 1 (n), 9, 16, 138.

[4] *Id.*, 6. This comment is the more striking, because it is made after Coke had emphasized the provision retaining in Parliament the authority to declare new treasons.

of the Constitution of the United States. Apart from this, the general terms of Coke's analysis are all such as to stress that the distinguishing mark of the Statute of Edward III is its limitation of the scope of the crime.

> And albeit nothing can concern the King, his Crown and Dignity, more then *Crimen laesae Majestatis*, High Treason: Yet at the request of his Lords and Commons, the blessed King by authority of Parliament made the Declaration, as is abovesaid: and therefore, and for other excellent laws made at this Parliament, this was called *Benedictum Parliamentum*, as it well deserved. For except it be *Magna Charta*, no other Act of Parliament hath had more honour given unto it by the King, Lords spirituall and temporall and the Commons of the Realm for the time being in full Parliament, then this Act concerning Treason hath had, For by the Statute of *1 H. 4. cap. 10.* reciting that where at a Parliament holden *21 R. 2* divers pains of treason were ordained by Statute, in as much as there was no man did know how to behave himself to doe, speak, or say, for doubt of such pains: It is enacted by the King, the Lords and Commons, that in no time to come any treason be judged otherwise, then it was ordained by this Statute of *25 E. 3* * * * * [After reciting other acts to the same effect:] And all this was done in severall ages, that the faire Lillies and Roses of the Crown might flourish, and not be stained by severe and sanguinary Statutes * * * *

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[6] *Id.*, 2–3. Note that James Wilson, as defense counsel in the Pennsylvania treason trials of 1778, referred to this designation of the "benedictum Parliamentum." 7 Penn-

At the outset of his discussion, he emphasizes the importance of the clause referring the declaration of new treasons to Parliament, and subsequently he points out that this means, broadly, that the judges "shall not judge à simili, or by equity, argument, or inference of any treason," and that the statutory injunction that nothing be taken to be treason thereunder which is not "specifically" so declared, is

> A happy sanctuary or place of refuge for Judges to flye unto, that no mans blood and ruine of his family do lie upon their consciences against law. And if that the construction by arguments *à simili* or *à minori ad majus* had been left to Judges, the mischiefe before this statute would have remained, *viz.* diversity of opinions, what ought to be adjudged treason, which this statute hath taken away by expresse words. * * *

He cautions, though, that

> * * * the clause * * * of restraint of like cases, &c. extends onely to offences, and not to tryals, judgements, or executions.[1]

But this seems to refer to matters of procedure and sentence, and, in view of the general emphasis of the treatise, does not mean that the scope of the offense might in effect be extended by new defi-

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sylvania Archives (Hazard, ed. Philadelphia, 1853) 51. Compare Coke's praise and emphasis on the restrictive character of the Statute of 1 Mar., *id.*, 23.

[1] *Id.*, 21, 22.

[2] *Id.*, 15. Compare 21: "And note this branch extendeth (as hath been said) to the offence, viz. treason, and not to tryall, judgement, or execution."

nitions of the evidence which would suffice to make out a charge under one of the classic headings.[8] Coke applies the doctrine of strict construction to limit the offense of adherence to enemies:

> A. is out of the Realm at the time of a Rebellion within England, and one of the Rebels flie out of the Realm, whom A. knowing his treason doth aide or succour, this is no treason in A. by this branch of 25 E. 3. because the traytor is no enemy, as hereafter shall be said; and this statute is taken strictly.[9]

Again, since the words of the statute punished him who should bring counterfeit money "en cestroialme", it was not an offense within this clause if the counterfeit was brought from Ireland, which for some purposes is a part of the realm,—

> * * * so wary are Judges to expound this statute concerning Treason, and that in most benigne sense. * * *[10]

There is nothing in Coke's discussion more explicit than the passages quoted above, to indicate that his praise of the restrictive policy evidenced by the Statute of Edward III was given with particular thought to prevention of oppressive resort to "treason" prosecutions in domestic political con-

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[8] Thus the remark quoted in the text is made in connection with his pointing out that standing mute or giving a confession may yet be a basis for conviction under the Statute. And compare his emphasis that conviction must be "upon direct and manifest proof, not upon conjecturall presumptions, or inferences, or straines of wit" in view of the Statute's requirement that defendant be "provable-ment" attained. *Id.* 12, 21.

[9] *Id.* 11.

[10] *Id.*, 18; *cf.* 4.

troversy, as distinguished from charges of dealing with external enemies. But, it will be noted that his reference to strict construction in the case of the crime of adhering to enemies points towards keeping that clause of the Act out of the sphere of home politics. And the fact is, that the "divers pains of treason * * * ordained by Statute", which are cited as oppressive and threatening in their vague scope, all focussed on the struggle for power immediately between essentially English factions. This seems true even of legislation directed against the assertion of papal power. This matter is more explicitly treated in Hale, and will be noted further at that point.

The earliest books are thoroughly ambiguous as to the kind of overt act, if any, required to make out a case under the various headings of "treason". Glanvill recognizes the existence of the

> Crimen quod in legibus dicitur crimen laesae maiestatis, ut de nece vel seditione personae domini regis vel regni vel exercitus

and this he later described as existing

> Cum quis itaque de morte regis vel de seditione regni vel exercitus infamatur [11]

but these definitions—though interesting for the hint of Roman influence ("laesae maiestatis")—shed no light on the types of conduct which would fit these general descriptions. At only one point, in describing the steps in procedure, does he approach specifications:

[11] Lib. 1, cap. 2 (Woodbine, 42; Beames, 2); Lib. 14, cap. 1 (Woodbine, 174; Beames, 278).

> Ad ultimum autem accusatore proponente se vidisse vel alio modo in curia probato certissime se scivisse, ipsum accusatum machinatum fuisse vel aliquid fecisse in mortem regis vel seditionem regni vel exercitus, vel consensisse vel consilium dedisse vel auctoritatem praestitisse * * *
>
> At length, however, when the accusor has charged that he saw, or that, by another way proved in court, he knew for a certainty that the accused had plotted or had done something towards the death of the king [against the life of the king] or insurrection in the kingdom or in the army or had consented or given counsel or conferred authority therefor * * *[12]

This seems to put simple conspiracy or plotting of the named ends on a par with their execution, so far as the offense goes. If conspiracy is put aside, however, Glanvill seems to refer to overt acts ("vel aliquid fecisse") not as inherently reflecting evil intent, but simply as an independent element of the crime; and this seems reinforced by the fact that, as he puts it, the relevance of the "something" which was done was that it put a train of events in motion, looking towards one of the specified purposes or results ("in mortem regis vel seditionem regnie vel exercitus": the use of the accusative with "in"). Thus when action is referred to as an element in the completed offense,—whatever the significance of the act in a charge of conspiracy to commit the offense,—Glanvill does not indicate that the action is significant as evidence of intent but as evidence of the fact of

[12] *Ibid.* (Woodbine, 174–175; Beames, 281). (Present author's translation.)

beginning execution of the intent. It is also interesting to note that at this early reference, there is the idea that contact or conference with dangerous persons presents *per se* a social danger.

These implications—including the suggestion of Roman ideas of the basic policy of protecting the head of the state—are reinforced in the terse definition of Bracton:

> Habet enim crimen laesae maiestatis sub se multas species, quarum una est ut si quis ausu temerario machinatus sit in mortem regis, vel aliquid egerit vel agi procuraverit ad seditionem domini regis vel exercitus sui, vel procurantibus auxilium et consilium praebuerit vel consensum, licet id quod in voluntate habuerit non perduxerit ad effectum.
>
> For the crime of lèse majesté includes many types, one of which is, if anyone out of rash daring [by a deed of rash daring?] should plot the death of the king, or do something or cause something to be done towards the betrayal of our lord the king or his army or gives aid and counsel to those procuring these things, or gives consent thereto, though he does not carry through to accomplishment what he had in intention.[13]

[13] F. 118b (2 Woodbine 334; 2 Twiss 259). "Seditio" is often used in this period interchangeably with "seductio". Though, in its context, the word may be more ambiguous in Glanvill, in Bracton it seems a fair inference that it does not mean "sedition" in the phrase "seditionem domini regis", and that hence it does not mean this regarding the army. Compare 2 Pollock and Maitland, History of English Law (2d ed. Cambridge, 1923) 503, n. 2: "We believe that in these passages [Glanvill and Bracton] the best rendering for *seditio* is, not *sedition*, but *betrayal*." Translation in text is by the present author.

Whether or not "ausu temerario" means that an overt act was necessary in Bracton's view for the offense of compassing the king's death—Coke thought not [14]—Bracton seems clearly to require overt acts for the offense denominated "seditionem domini regis vel exercitus sui", and the something which must be shown to have been done ("aliquid egerit vel agi procuraverit") is treated as important not as evidence of intent, but because it puts in train a course of action leading to the forbidden result (the use of "ago" with "ad * * *" seems significant, i. e.). The importance of the fact of action taken towards the prohibited purpose seems implied in the contrast of "machinatus si[t] in mortem regis" and "aliquid egerit * * * ad seditionem * * *", and

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Professor George E. Woodbine has given his opinion regarding Bracton's use of "consilium" in this passage in a letter of August 20, 1944, as follows:

> In the passage from Bracton (f. 118b) * * * I would not regard "comfort" an adequate translation of *consilium*. "Counsel", in its usual sense, is apparently what Bracton had in mind. To Bracton *auxilium et consilium* would be a matter of fact and (unlike our technical "aid and comfort") non-technical expression. He clearly had in mind the case of the man who stays in the background and gives advice to the one actively engaged in the plotting. I take it that the giving of this advice is with obvious treacherous intent. If the plotter to whom the advice is given is regarded as the "enemy", *consilium* should certainly be construed to cover the fact of contact with the enemy.

[14] Coke, 6. Foster, 205, would take it not adverbially regarding the quality of the intent, but as referring to an overt act.

by the final contrast of the intention and the incomplete course of action.

Britton and Fleta are of no assistance in defining the scope of the offense, though the former's definition is interesting for the sweeping principle of punishing "betrayal" which he announces and for his concentration on plotting the king's death.[15] Staundford notes that at common law "cestuy qui succorda as enemyes le roy" was guilty of treason; this is probably the offense of adherence ("succurro"?) and implies an overt act as an independent element of the crime.[16] His most interesting discussion concerns the offense

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[15] See Britton, Liv. 1, Chapitre IX (1 Nichols, 40): "Treson est en chescun damage qe hom fet a escient ou procure de fere a cely a qi hom se fet ami * * * Graunt treisoun est a compasser nostre mort, ou de nous desheriter de nostre reaume, ou de fauser nostre seal, ou de contrefere nostre monee ou de retoundre * * *" *Cf.* id., Liv. 1, Chapitre XXIII (1 Nichols, 99): "Et cum il vendrunt en jugement, si face le encusour soen apel pur nous en ceste forme par acun serjaunt: Johan, qi ci est, apele Peres, qi iloeques est, de ceo qe, com il fu en certeyn leu a tel certeyn jour a tel an, la oy sesmes cestui Johan parparler tele mort, ou tiel treysoun par entre cestui Peres et un autre, tel par noun, et par tieles affiaunces. * * *" Nichols translates this as: "And when they appear for trial, let the accuser make his appeal for us by some serjeant in this manner. 'John who is here appeals Peter who is there of this, that being in such a place on such a day and year, the same John there heard such a death or such a treason contrived between the same Peter and another, such an one by name, and by such confederacies,' and that John is now ready to prove by his body in any manner the Court shall award that this is the truth." See Fleta, Lib. 1, Cap. 21. *Cf.* The Mirrour of Justices (Robinson, ed., Washington, 1903) 39, 91; see 2 Pollock and Maitland, *op. cit. supra*, note 13, p. 478, n. 1.

[16] Staundford, Lib. 1, Cap. 2, f. 8.

of compassing the king's death, as set out in the Statute of Edward III, of which he comments,

> Cest compassement, ou imagination, sauns reducer ceo al effect, est grand treason, come apiert. M. 19. H. 6. f. 47. & P. 13. H. 8. fo. 13. Mes intant que compassement & imagination sont secrete, & ne poient etre conus sinon per un overt fait, est requisit daver ascun chose fait, a signifier le dit compassement ou imagination. Per que ie query, si le dit compassemt ou imagination uttere per parolx soit sufficient signification de ceo ou nemye * * * Bracton. Semble que cy * * * Britton in semblable maner * * *.[17]

He notes that the Statute of Edward III adopts the same terms used by the early treatises regarding the offense of compassing the king's death, and so indicates his belief that the statute is to be interpreted according to the scope of the previous authorities. Coke disagreed, emphasizing the over-all and explicit requirement of an overt act under that statute, though he felt that a writing might be an overt act.[18] Staunford does not mention the overt act requirement of the Statute of Edward III, and in view of his broad language it is questionable whether he did not overlook it in connection with his analysis of the offense of compassing the king's death. In any event, he introduces us to an ambiguous terminology which bedevils discussion henceforth. When he says that an "overt fait" is necessary, because compassing is secret and cannot be known,

[17] *Id.*, 2-H. Fortescue has no discussion of the definition of the crime.

[18] Coke, 14.

without such, he seems to regard the act as relevant simply as evidence of the treasonable intent; but he sums up by saying that "ascun chose fait" is necessary "a signifier" ("declare" or "show") the compassing. The overt act might "declare" the compassing, however, either in the sense of evidencing a treasonable intent, or of translating the intent into the world of action by some thing done towards its execution. There seems to be no further help in Staundford to resolve this difficulty, and his discussion is of limited usefulness in any case, because it deals only with the crime of imagining the death of the king.

Coke uses this ambiguous wording, in repeated statements that the offenses of compassing the king's death and adhering to his enemies include the element of "declaring the same by some overt deed".[4] There are important passages in which he seems to regard the overt act as relevant, because and insofar as it helps prove treasonable intent. Thus, speaking of the Statute of Edward III, he states,

> The composition and connexion of the words are to be observed, *viz.* [thereof be attainted by overt deed]. This relateth to the severall and distinct treasons before expressed, (and specially to the compassing and imagination of the death of the King, &c. for that it is secret in the heart) and therefore one of them cannot be an overt act for another. As for example: a conspiracy is had to levie warre, this (as hath been said, and so resolved) is no treason by this Act untill it be levied, therefore it

[4] *Id.*, 3, 4, 6, 8.

> is no overt act or manifest proofe of the compassing of the death of the King within this Act; for the words be (*de eeo* &c.) that is, of the compassing of the death. For this were to confound the severall Clauses * * *[20]

Thus he puts special emphasis on the overt act requirement as applied to that one of the offenses embraced by the statute the gist of which most clearly is the intent. Previously, in constructing an analytical table of the crimes defined by the act, he included in the offenses of compassing the king's death and adhering to his enemies the element of "declaring the same by some overt deed", as has been noted; but he omits this reference regarding the levying of war.[21] Clearly he views an overt act as an element of the last named crime, but it would seem that he felt that the conduct which would amount to levying war so plainly, of its intrinsic character, "declared" the treasonable intent, that no special emphasis was called for in his analysis. Note also, in the passage quoted above, that if a conspiracy to levy war were treated as a sufficient overt act to establish the offense of compassing the king's death, in Coke's view its relevance would be as an "overt act or manifest proofe of the compassing * * *"

Further, he explains his view that words will not generally make an overt act, in terms which might seem to indicate that the relevance of the overt act is to prove clearly the existence of treasonable intent:

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[20] *Id.*, 14.

[21] *Id.*, 3.

> * * * * the wisdome of the makers of this law would not make words only to be Treason, seeing such variety amongst the witnesses are about the same, as few of them agree together. But if the same be set downe in writing by the Delinquent himselfe, this is a sufficient overt act within this statute. * * *
>
> * * * * *
>
> In the Preamble of the statute of *1. Mar.* concerning the repeale of certaine Treasons, &c. It is agreed by the whole Parliament, that lawes justly made for the preservation of the Common-wealth without extreame punishment, are more often obeyed and kept, then lawes and statutes made with great and extreame punishments; and in speciall, such lawes and statutes so made: whereby not only the ignorant and rude unlearned people, but also learned and expert people minding honesty, are oftentimes trapped and snared, yea, many times for words only, without other fact or deed done or perpetrated: therefore this Act of *25 E. 3.* doth provide, that there must be an overt deed. But words without an overt deed are to be punished in another degree, as an high misprision.[22]

However, a close examination of these famous passages suggests that, in the first, Coke is merely saying that—regardless whether offered to prove intent or overt act—mere spoken words are inherently too unreliable in witnesses' memories to be a just basis for establishing so high a crime. And in the approving recital of the Statute of 1 Mary, it is important to note that the objection

[22] *Id.*, 14.

is particularly to a case where the spoken words are the *sole* evidence, to prove all elements of the crime. Rather than reading this to mean that the overt act must always be such as itself evidences treasonable intent, it would seem more natural to construe the criticism as being simply that in many cases the spoken words, being offered as sole proof of the intent, were not adequate for that purpose, quite apart from their adequacy as an overt act. If spoken words are not generally a sufficient overt act, it will then be, as Coke later suggests was the general common law doctrine, simply because they generally do not represent a sufficient advance beyond the stage of thought into that of execution.[25] Though the interpretation of Coke's words here set out seems a reasonable one, his marginal note to the quotation from the preamble of the Statute of 1 Mary throws the matter back into doubt, for there he warns,

> *Nota*, this Act of 25 E. 3 saith, *per overt fait, per apertum factum,* and not *per apertum dictum,* by word or confession.

Coke here created an ambiguity which continues to fog analyses of the law of treason, as may be seen, for example, in Hale.

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[25] Coke, 5. The marginal note on the same page comments, "Sed haec voluntas non intellecta fuit de voluntate nudis verbis, aut scriptis propalata, sed mundo manifestata fuit per apertum factum, Id est, cum quis dederat operam, quantum in ipso fuit, ad occidenda, & sic de similibus." This seems to involve the ambiguity already noted in the use of the word "declare".

Throughout his discussion, Coke gives examples of overt acts which, without exception, seem acts which themselves are some evidence of treasonable intent. It is not clear whether he would hold that a meeting of conspirators to plot the king's death was a sufficient overt act for that broadest of offenses.[24]

On the other hand, there is evidence that Coke thought of the overt act as a separate element of the offense, whose function was not to furnish more objective evidence of the treasonable intent, but to establish that the business had moved from the realm of thought into the realm of action. He does not clearly link this with a general policy of the criminal law, that men are not prosecuted for wicked thoughts alone; but the belief that, after the Statute of Edward III at least, treason was in this respect no different from other crimes seems implicit in his treatment. Thus he begins by contrasting the common law crime of compassing the king's death with the general common law offense of compassing the death of an ordinary

[24] Coke does not indicate that of his own knowledge he knew of Arden's case (1583–4), referred to by Hale (vol. 1, p. 119); the case was apparently first reported after his death, in 1 Anderson 104 (1664). See note 39, *infra*. In the passages cited in notes 25, 26 and 27, *infra*, it will be noted that his references to persons "conspiring" all include mention of some further overt act. But his assertion that a conspiracy to levy war could not be an overt act of compassing the king's death (note 20, *supra*) seems to rest on a mechanical view of the separateness of the statutory definitions, and not on the view that the "conspiring" was not otherwise a sufficient overt act. Quaere, whether the sending of letters (referred to in the passage quoted at note 25, *infra*), might not involve ambiguous conduct.

subject. He cites (Coke, 5) the maxim "Voluntas reputabatur pro facto", endorsed by Bracton, but points out that even under this principle, to be guilty, the defendant "must declare the same [i. e. his "voluntas"] by some open deed tending to the execution of his intent, or which might be cause of death" and that the crime was made out:

> So as it was not a bare compassing or plotting of the death of a man, either by word, or writing, but such an overt deed as is aforesaid, to manifest the same. So as if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the execution of his compassing."

The examples he gives are of aggravated attempts failing short of success, but his emphasis is not that the deeds evidence the intent, but—a more objective stress—that they "tend to the execution of his intent". He then points out that the requirement of an overt act, under the Statute of Edward III, applies to all of the offenses defined therein, including compassing the king's death; and, as he has asserted that the Statute "is for the most part Declaratory of the ancient Law", it is a fair inference that he would interpret the overt act requirement now inserted in the offense of compassing the king's death in the same manner which he had interpreted that element in the general common law offense of plotting the death of a subject. The objective tendency of the act to forward a course of conduct seems the aspect which is stressed when he explains that the words "Per overt fait"

" Coke, 5.

> doth also strengthen the former exposition of the word [provablement] that it must be probably, by an open act, which must be manifestly proved. As if divers do conspire the death of the King, and the manner how, and thereupon provide weapons, powder, poison, assay harnesse, send letters, &c. or the like, for execution of the conspiracy. Also preparation by some overt act, to depose the King, or take the King by force, and strong hand, and to imprison him, until he hath yeelded to certain demands, this is a sufficient overt act to prove the compassing, and imagination of the death of the King: for this upon the matter is to make the King a subject, and to dispoyl him of his kingly office of royall government.[25]

This seems also true of the statement that

> If a subject conspire with a foraine Prince beyond the seas to invade the Realme by open hostility, and prepare for the same by some overt act, this is a sufficient overt act for the death of the King, for by this Act of Parliament in that Case there must be an overt act.[26]

And the emphasis upon the objective tendency of the act to further a plan of conduct appears in his explanation of the significance of the statute of 3 Henry VII, which made it a felony to plot the king's death:

> By this Act it expressly appeareth by the judgement of the whole Parliament, that

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[25] *Id.*, 12. Note, however, the ambiguous use of the word "prove": in the last sentence of the quotation.

[26] *Id.*, 14.

> besides the confederacy, compassing, conspiracy, or imagination, there must be some other overt act or deed tending thereunto, to make it treason within the statute of 25 *E.* 3. And therefore the bare confederacy, compassing, conspiracy, or imaginations by words only, is made felony by this Act. But if the Conspirators do provide any weapon, or other thing, to accomplish their devilish intent, this and the like is an overt act to make it treason.[27]

So also when Coke pronounces that

> A compassing or conspiracy to levy war, is no Treason, for there must be a levying of war *in facto*[28]

he seems sharply to distinguish the overt act from the showing of intent since his statement clearly assumes that a treasonable intent appears, and yet the offense of levying war is not made out, for lack of the overt act. And he points up the sharp distinction between intent and act as separate elements of the crime, by citing the words of a proper indictment:

> For first it is alledged according to this act, *Quod proditorie compassavit, & imaginatus fuit mortem & destructionem dñi regis, & ipsum dom. regem interficere, &c.* In the second part of the indictment is alledged the overt act, *& ad illam nephandam, & proditoriam compassationem, imaginationem, & propositum suum perficiend & perimplend*, and then certainly to set down the overt fact for preparation to take, and imprison the King, or any other sufficient overt act, which

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[27] *Id.*, 38.

[28] *Id.*, 9

of necessity must be set down in the Indictment.[29]

Thus Lord Coke may be cited, with some conviction, to both purposes; that the significance of the overt act is that it confirms the evidence of evil intent, or that it is relevant wholly apart from evidence of intent, in order to show that the defendant's guilt had moved from the realm of thought alone into that of action. Coke's attention was apparently not directed to the problem of defining the precise function of the overt act element, and hence his words must be taken in either case with caution. However, on the whole, in view of his over-riding emphasis on the distinct quality of the overt act element under the Statute of Edward III, it seems that he does not mean to insist that it be an act which in itself is evidence of the treasonable inten[illegible].

(b) Treatises published in the 17th Century

Hale comments frequently on the uncertain scope of "treason" at common law and during certain periods of legislative activity, notably under Richard II, and on the resultant uncertainty and insecurity of the individual. Thus, after stating the statute of 1 Henry IV, which restored the terms of the Statute of Edward III as the guide in defining the offense, he warns,

> Now altho the crime of high treason is the greatest crime against faith, duty, and human society, and brings with it the greatest and most fatal dangers to the government, peace, and happiness of a kingdom,

[29] *Id.*, 12.

> or state, and therefore is deservedly branded with the highest ignominy, and subjected to the greatest penalties, that the law can inflict; yet by these instances, and more of this kind, that might be given, it appears, 1. How necessary it was, that there should be some fixed and settled boundary for this great crime of treason, and of what great importance the statute of *25. E. 3* was, in order to that end. 2. How dangerous it is to depart from the letter of that statute, and to multiply and inhanse crimes into treason by ambiguous and general words, as *decroaching of royal power, subverting of fundamental laws,* and the like; and 3. How dangerous it is by construction and analogy to make treasons, where the letter of the law has not done it: for such a method admits of no limits or bounds, buf runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men.[30]

He is clearcut, in pointing out that the policy and the terms of the Statute of Edward III limit the power of judges, praising

> The great wisdom and care of the parliament to keep judges within the bounds and express limits of this act, and not to suffer them to run out upon their own opinions

[30] 1 Hale 86. Note that Hale's language is such that it might be interpreted to caution merely against expanding the scope of treason by adding new substantive definitions, and not to embrace the same result when reached by more "liberal" construction of the familiar definitions or of the evidence requisite to satisfy them. But this interpretation seems too narrow, especially in view of the last sentence of the quotation. See also, *id.*, 82, 142, 151, 157, 293.

> into constructive treasons, tho in cases, that seem to have a parity of reason (*like cases of treason*) but reserves them to the decision of parliament: this is a great security, as well as direction, to judges, and a great safeguard even to this sacred act itself.[31]

Despite these general assertions of the strength of the restrictive policy embodied in the basic Statute, Hale has little to say in specific explanation of the historic bases of that policy. His only detailed comment, however, seems to rest the policy on the abuse of "treason" in domestic factionalism:

> And we need no greater instance of this multiplication of constructive treasons, than the troublesome reign of king *Richard* II. which, tho it were after the limitation of treasons by the statute of *25 E. 3.* yet things were so carried by factions and parties in this king's reign, that this statute was little observed; but as this, or the other party prevailed, so the crimes of high treason were in a manner arbitrarily imposed and adjudged to the disadvantage of that party, that was intended to be suppressed; so that *de facto* that king's reign gives us as various instances of these arbitrary determinations of treasons, and the great inconveniences that arose thereby, as if indeed the statute of *25 E. 3.* had not been made or in force. And tho most of those judgments and declarations were made in parliament; sometimes by the king, lords, and commons; sometimes by the lords, and afterwards affirmed and enacted, as laws; sometimes by a plenipotentiary power committed by

[31] *Id.*, 259.

> acts of parliament to particular lords and others, yet the inconvenience, that grew thereby, and the great uncertainty that happened from the same, was exceedingly pernicious to the king and his kingdom.[32]

In expounding the meaning of the overt act element in the crime,[33] Hale frequently uses the sort of ambiguous terminology which we have seen take its start in Staundford and Coke. Thus when he says that the overt act is necessary to "prove", or "manifest", or "declare" the compassing of the king's death or the adhering to his enemies, this might imply that the act is relevant because it helps prove the intent, and that therefore only such an act as is some evidence of the intent will satisfy this requirement of the offense.[34] Like Coke, he does not, however, use even these doubtful terms regarding the levying of war.[35]

Explaining the scope of the offense of compassing the king's death, he further notes

> Tho the conspiracy be not immediately and directly and expressly the death of the king, but the conspiracy is of something that in all probability must induce it, and the overt-act is of such a thing as must induce

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[32] *Id.*, 83. Compare his strong criticism of the ruling of the judges, *Int. Parl. II R. 2.*, that the king could be said to be treasonably "compelled" when pressure was put on him only by the familiar political means of withholding supplies, or by persuasion or strong petition. *Id.*, 109, 110; *cf.* 267.

[33] See *id.*, 121: "* * * the overt-act is an essential part of the indictment."

[34] *See, e. g.*, passage quoted at note 43, *infra*; also, 91, 92, 107, 108, 110, 149, 151, 167.

> it; this is an overt-act to prove the compassing of the king's death, * * *

But this states what kind of an overt act will surely satisfy the requirements of proof, and does not necessarily exclude acts less forthright than those which "must induce" the king's death.

We have seen that Coke rejected spoken words as an overt act of treason in terms which might seem to imply that this was because they were inherently insufficient evidence of the treasonable intent, thereby mingling the two basic elements of the crime. Hale, more plainly restating Coke, objects to the use of spoken words for their intrinsic unreliability as proof of any element of such offense:

> Regularly words, unless they were committed to writing, are not an overt-act within this statute. *Co. P. C., p. 14;* and the reason given is, because they are easily subject to be mistaken, or misapplied, or misrepeated, or misunderstood by the hearers.[35]

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[35] *Id.*, 109.

[36] *Id.*, 111–112. The notes added by Hale's first editor, Emlyn, are much more clear on this point, and interesting as reflecting an early 18th century understanding of the nature of the requisite overt act. In note (k), p. 111, thus, Emlyn comments that even if certain passages cited by Staundford from Bracton and Britton could be deemed to declare spoken words sufficient overt acts at common law,

> yet it does not follow, that they would be so by the statute of *25 E. 3.* which expressly requires the proof of an overt-act, and consequently disallows the evidence of bare words, for *words* and *acts* are contradistinguished from each other. See *Co. P. C. 14* in

But, he likewise, is not clearcut in his analysis, since for the further support of his position, he cites *Pyne's Case,* which both on its facts and opinion seems to turn on the finding that the spoken words, offered as the sole evidence in the case, were insufficient to make out the intent, without a ruling on their sufficiency as an overt act.[37]

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margine. The preamble of *1 Mariae, cap. 1, sess. 1* makes it matter of complaint, *that many had for words only suffered shameful death.*

And in note (1), p. 112, Emlyn adds to Hale's explanation of the unreliable quality of testimony regarding spoken words, the comment that

> This is one but not the only reason, for another reason was, because men in a passion or heat might say many things, which they never designed to do; the law therefore required, that in a case of so nice a nature, where the very intention was so highly penal, the reality of that intention should be made evident by the doing some act in prosecution thereof.

This comment finds evidence of spoken words alone to be insufficient for either of the two purposes the evidence is made to bear: there is deemed insufficient evidence of intent, but also there is not thought to be a sufficient step in execution. *Cf.* note (y), p. 116; note (b), p. 117.

[37] Cro. Car. 125. The sole evidence in this case was the speaking of words reflecting upon the ductability and intelligence of the king. The report states that

> Upon consideration of the precedents of the statutes of treason it was resolved by the seven judges there named, and so certified to his majesty, that the speaking of the words there mentioned, tho they were as wicked as might be, were not treason; for they resolved that, unless it were by some particular statute, no words will be treason; for there is no treason at this day but by the statute of 25 E. 3. for imagining

In two respects, however, Hale's analysis of the offense of compassing the king's death seems to make clear that the overt act need not be such as is evidence of a treasonable intent, and that it may even be "indifferent" in character. Thus, after developing the thesis that spoken words are not alone enough to make out an overt act of treason, he lays down these qualifications:

> (1.) That words may expound an overt-act to make good an indictment of treason of compassing the king's death, which overt-act possibly of itself may be indifferent and unapplicable to such an intent; and therefore in the indictment of treason they may be joined with such an overt-act, to make the same applicable and expositive of such a compassing, as may plainly appear by many of the precedents there cited [in *Pyne's case*, Cro. Car. 125, q. v.].
>
> (2.) That some words, that are expressly menacing the death or destruction of the king, are a sufficient overt-act to prove that compassing of his death, *M. 7 Car. B. R. Crohagan's* case in *Croke* [Cro. Car. 332], who being an *Irish* priest, *7 Car. 1* at *Lisbon* in *Portugal*, used these words, "*I will kill the king* (innuendo dominum *Carolum* regem *Angliæ*) *if I may come unto him*," and in *Aug. 9 Caroli* he came into *England* for the same purpose. This was proved upon his trial by two witnesses, and for

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the death of the king, &c. and the indictment must be framed upon one of the points in that statute; and the words spoken there can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them.

> that his traitorous intent and the imagination of his heart was declared by these words, it was held high treason by the course of the common law, and within the express words of the statute of *25 E. 3.* and accordingly he was convicted, and had judgment of high treason; yet it is observable, that there was somewhat of an overt-act joined with it, namely, his coming into *England*, whereby it seems to be within the former consideration, namely, tho the coming into *England* was an act indifferent in itself, as to the point of treason; yet it being laid in the indictment, that he came to that purpose, and that in a great measure expounded to be so by his minatory words, the words coupled with the act of coming over make his coming over to be probably for that purpose, and accordingly applicable to that end.[38]

This passage might be interpreted to mean that the "indifferent" overt acts would not suffice, standing alone, without being coupled with obviously harmful words, here also regarded as in the nature of overt acts. But it seems a fairer reading that the words are not treated as an essential part of the overt act in these cases, but only as evidence linking the overt act to the intention. Further, it is a fair inference from the foregoing quotation, and especially from the first explanation offered of *Crohagan's Case*, that what was really in Hale's mind in his general assertion of the insufficiency of spoken words as an overt act was a judgment that in many cases where the words were the only evidence in the case, they

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[38] *Id.*, 115–116.

were insufficient *qua* evidence of intent, rather than *qua* evidence of overt act.

Secondly, Hale declares that the mere meeting of persons, with the intent of plotting the king's death, is a sufficient overt act to make out the crime of compassing that end:

> If there be an assembling together to consider how they may kill the king, this assembling is an overt-act to make good an indictment of compassing the king's death. This was *Arden's* case [1 Anderson 104], 26 *Eliz.* and accordingly it was ruled *Decem. 14 Caroli* at *Newgate* in the case of *Tonge* and other confederates [Kelyng, 17] * * *
>
> * * * * * *
>
> *Vide Anderson's Reports Placito 154*, which was the case of *Arden* and *Somerville* and others, who conspired the death of queen *Elizabeth*, resolved by all the justices, that a meeting together of these accomplices to consult touching the manner of effecting it was an overt-act to prove it, as well as *Somerville's* buying of a dagger actually to have executed it. * * *[20]

The fact that both of the foregoing propositions are laid down with reference to the overt act in compassing the king's death naturally raises the question whether they are peculiar to that branch of the Statute of Edward III. The second ruling, that a mere meeting with intent to plan the effectuation of a treasonable intent is a sufficient overt act, is, at any rate according to Hale, inapplicable to the crime of levying war

[20] *Id.*, 119, 122.

against the king, for—agreeing with Coke—he declares that

> * * * a bare conspiracy, or consultations of persons to levy a war, and to provide weapons for that purpose: this, tho it may in some cases amount to an overt-act of compassing the king's death, yet it is not a levying of war within this clause of this statute. * * * *[1]

Hale gives no more explanation of this than does Coke, and seems to rest the dogma simply on the statutory terms themselves: "the act, saith *levy guerre*".[2] The crime of "adhering to the king's enemies * * * giving them aid or comfort"

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[1] *Id.*, 131; *cf.* 135, 144, 148.

[2] *Id.*, 130. Compare Coke, 10, where he explains that though *13 Eliz. cap. 1* declared a conspiracy to levy war to be treason,

> * * * it was resolved by all the Justices, that it was no treason within the statute of 25 E. 3. as hath been said. The words in this law are [levie guerre:] An actuall Rebellion or Insurrection is a levying of war within this Act, and by the name of levying war is to be expressed in the indictment.

So also, regarding adherence, Coke merely says that

> This is here explained, viz. in giving aide and comfort to the Kings enemies within the Realme or without * * *

Ibid. The same reliance on the statutory terms as self-evident in scope appears in his terse declaration that under the words "si home counterface le grand Seale"

> A Compassing, intent, or going about to counterfeit the great seale is no treason, but there must be an actuall counterfeiting * * *

Id., 15. *Cf.* Hale, 181–6.

seems stated no less bluntly; but neither Coke nor Hale raises the question whether a meeting of conspirators to plan such giving of aid or comfort would be an overt act of adherence.[42] One might argue that the first offense (compassing the king's death) is defined in a term referring to thought, and the other two in terms referring to action, and that this indicates that the danger involved in the first was regarded as greater, or the offense more heinous, so that the overt act requirement is properly satisfied, in the case of the first offense, by conduct less close to accomplishment of the

[42] Both seem to think the statutory terms concerning adherence to be so plain as to call for little discussion, and their analyses furnish little help in this connection. It has been noted that in his analytical table of the elements of the different branches of treason under Statute Edward III, Coke stated that both the crimes of compassing the king's death and adhering to his enemies involved the element of "declaring the same by some overt act"; but that he defined the other major offense simply as "Levying war against the King". Coke 3–4. Hale adopts this analysis at one point. (p. 91). But *cf. id.* 149–150. This verbal distinction is obviously a very slender support for arguing that a basic difference was intended in the elements of these offenses, however. But, Coke, 14, states that "If a subject conspire with a forain Prince beyond the seas to invade the Realme by open hostility, and prepare for the same by some overt act, this is a sufficient overt act for the death of the King, for by this Act of Parliament in that Case there must be an overt act." This may imply that conspiracy to adhere to enemies is not per se a sufficient overt act for that charge, or even for a charge of compassing. As regards adherence, however, it is not clear whether Coke is referring to a foreign prince then at peace with England, in which case, of course, there would as yet be no "enemy" to whom to adhere.

treasonable intention than in the cases of the other two branches of the crime. At least as applied to modern conditions, however, this seems to place too much weight on the words alone, and the proposition that the offenses of levying war and adhering to enemies present less serious perils to the security of the community than that of compassing the king's death is dubious enough in the circumstances of the present-day state to cast the burden of proof on him who urges it. The Statute of Edward III has always been treated, as it was treated in the adoption of its words in American law, as declaring broad policy for an indefinite future, and one should, therefore, be slow to narrow it to the peculiar political circumstances of medieval or Renaissance England. Moreover, so far as the logical pertinence of Hale's analysis is concerned, a proper understanding of the significance of the overt act in any of the branches of treason makes his argument applicable to all. It is fallacious to hold that any act has a character in and of itself. What it means depends on many other facts, of memory, present perception, and logical prediction, in the mind of the observer. There is, therefore, no reason to believe that in the case of levying war or adhering to enemies, a person might not be proved to have committed acts highly dangerous to the security of the community, but which, in the absence of extrinsic evidence linking them to the actor's general purpose, would seem "innocent on their face". There is, in other words, nothing peculiar to the offense of compassing the king's death which would bring it about that only there might one be presented with acts "indif-

ferent" except when appraised in the light of accompanying words or other evidence of intent. Whether Lord Chief Justice Hale would agree to this analysis must be admitted to be conjectural, for he does not spell out his thought more directly than is indicated in the passages quoted. However, in discussing the action taken in *Rot. Parl. 21 R. 2 n. 18,* Hale seems to indicate quite clearly that he did not believe that there was any fundamental difference in the significance of the overt act element in the offenses of compassing the king's death and levying war against him. The Parliament had there declared

> Chescun qe compasse, et purpose la mort le roy, ou de lui deposer, ou de susrendre son homage liege, ou celuy, qe levy le people, et chivache encountre le roy a faire guerre deins son realme, et de ceo soit duement attaint, et adjugge en parlement, soit adjuggez come traytor de haut treason encountre la corone * * *

Hale declares of this act that

> These four points of treason seem to be included within the statute of *25 E. 3* as to the matter of them * * *; but with these differences, *viz* * * * 3. But that, wherein the principal inconvenience of this act lay, was this, that whereas the statute of *25 E. 3,* required an overt-act to be laid in the indictment, and proved in evidence, this act hath no such provision, which left a great latitude, and uncertainty, in point of treason, and without any open evidence, that could fall under human cognizance, subjected men to the great punishment of treason for their very thoughts, which with-

out an overt-act to manifest them are not triable but by God alone.[43]

Kelyng and Hawkins give little which further illuminates the definition of the offense.[44] Kelyng

[43] Hale, 85; *cf.* 111. This act and its repeal by Hen. IV, ch. 10, are relied on by Judge Hand in U. S. v. Robinson, 259 Fed. 685, 689 (S. D. N. Y. 1919), for his argument that the overt act must evidence intent.

[44] Kelyng is a narrative of several treason cases under Charles II. Hawkins foregoes discussion of the political policies involved in the issue of strict or liberal construction of the crime, limiting himself largely to digest-style paragraphs on the statutes and decisions. The overt act is a distinct element under each branch of "treason". 1 Hawkins 92. Words may serve to explain an act in itself indifferent, *id.*, 94; and a meeting of conspirators is a sufficient overt act to make out a compassing the king's death, *id.* 92; Kelyng, *15, 17, 20. Both are as ambiguous as previous writers on the question of whether words are not generally a sufficient overt act. See Hawkins, 93, 94, 96; *cf.* Kelyng, *13. But Hawkins' comment on Peacham's Case, where a writing was the sole evidence, seems to point out that such evidence must be viewed, respectively, in its function of showing intent, and of establishing an overt act, for he finds the evidence in that case inadequate on these distinct grounds:

> * * * it has been holden, that written words in a sermon or other writing may amount to overt acts of compassing the king's death, though the same neither actually were, nor ever were intended to be, preached or published. But this opinion seems to be over-severe; for though it be true that *scribere est agere*, yet surely it cannot with any propriety be said, that to write in such a private manner *est aperte agere*, and it seems rigorous to make that amount to a malicious design against the king, which perhaps was only done by way of amusement or diversion.

Hawkins, 93.

does add great emphasis to the doctrine that a meeting of conspirators is a sufficient overt act in compassing the king's death, by the resolutions of the judges which he reports concerning knowing attendance upon a meeting of conspirators. Thus in the consideration of the case of Tong and others, he notes that

> It was resolved by all the Judges, that the meeting together of Persons, and consulting to destroy the King, was of itself an Overt Act to prove the compassing the King's Death.
>
> It was resolved that where a Person knowing of the Design does meet with them, and hear them discourse of their traiterous Designs, and say or act nothing; This is High-Treason in that Party, for it is more than a bare Concealment, which is *Misprision*, because it sheweth his liking, and approving of their Design; but if a Person not knowing of their Design before, come into their Company, and hear their Discourses, and say nothing, and never meet with them again at their Consultations, that Concealment is only Misprision of High-Treason. But if he after meet with them again, and hear their Consultations, and then conceal it, this is High-Treason. For it sheweth a liking, and an approving of their Design * * * [citing Sir Everard Digby's Case, 1 St. Tr. 234] [45]

So, also, he reports that in considering the case of the conspiracy to levy war in the North Riding of Yorkshire,

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[45] Kelyng, 17.

> It was agreed that the bare knowledge of Treason, and the concealment of it was not High-Treason, but Misprision of Treason. But in Case any thing be proved upon Evidence, that the Party liked or approved of it, then it is High Treason; or if the Party knew of the Design, and after such Knowledge, met with the Conspirators at their Consultation; or if he went knowingly to their Consultations several Times, this is Evidence of his Approbation of the Design, and is High Treason.[46]

These passages are not without ambiguity, as to whether the emphasis is on the evidence as evidence of intent, or as adequate evidence, also, of an overt act; but since Kelyng notes the general, basic ruling, that a conspiratorial meeting is a sufficient overt act, it seems that the intent is to find the more borderline case to involve a sufficient overt act as well. Though the broad doctrine reported by Kelyng might be thought of dubious authority, since it originates in the period of reprisals following the Restoration, it has been accepted without such criticism by modern English authority.[47]

Foster gives us the most illuminating discussion of the 18th century writers on the nature of the overt act element in treason. His analysis rests on the familiar declaration that wise policy calls for careful definition of the scope of the offense,

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[46] *Id.*, *21.

[47] See 4 Stephen's Commentaries on the Laws of England (18th ed., London, 1925) 457; 8 Holdsworth, History of English Law (2d ed. London, 1937) 323.

in the interest of individual security."[48] Thus he makes it clear that an overt act is an essential element of the crime under each branch of the Statute of Edward III.[49] But, despite his fundamentally cautious approach to the definition of the offense, he does not permit it to be wrongly narrowed by a muzzy analysis of the relation of its elements to each other. He insists that the overt act is required, not merely as cumulative evidence of the intent, but for the distinct purpose of demonstrating that the defendant had moved from the realm of thought into that of execution.

> The words of the statute descriptive of the offence must be strictly pursued in every indictment for this species of treason. It must charge, that the defendant did traitorously *compass and imagine &c,* and then go on and charge the several overt acts as the means employed by the defendant for executing his traitorous purposes. For the compassing is considered as the treason, the overt acts as the means made use of to effectuate the intentions and im-

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[48] Foster, 207, 237. There is an intimation that he views the restrictive policy as based on the desire to limit abuse of "treason" in purely domestic factionalism, in his comment that the statute of 1 Ph. & M., in "reducing all treasons to the standard of the *25 E. III*", brought it about that thereby "the subject was secured in his journey through life against the numerous precipices which the heat and distemper of former times had opened in his way * * *" *Id.*, 237. Compare the breadth which he was eager to give offenses of trafficking with an external enemy, notes 58 and 60, *infra*.

[49] *Id.*, 220.

> aginations of the heart: and therefore in the case of the regicides the indictment charged, that they did traitorously compass and imagine the death of the King; and the taking off his head was laid, among others, as an overt act of compassing; and the person who was supposed to have given the stroke was convicted on the same indictment.
>
> From what hath been said it followeth, that in every indictment for this species of treason, and indeed for levying war, or adhering to the King's enemies, an overt act must be alleged and proved. For the overt act is the charge, to which the prisoner must apply his defence. * * *

Foster particularly deserves our gratitude for introducing the first clarity into the discussion of words and writings as overt acts. He points out that, considered as evidence of intent, mere spoken words are generally unreliable evidence, because of the likelihood that they "are often the effect of mere heat of blood"; and that, considered as evidence of anything, they are unreliable because they "are always liable to great misconstruction from the ignorance or inattention of the hearers, and too often from a motive truly criminal."[50] So much is familiar. Foster pushes beyond prior analyses when he clearly points out that the objection to basing treason on unpublished writings (*Peacham's* and *Sidney's* cases), is that there the written words are being made to do double duty as evidence both of intent and overt act, and that

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[50] *Id.*, 194: compare the third paragraph quoted at note 56.

[51] *Id.*, 200.

they will generally not, of themselves, bear such weight. But, if other satisfactory evidence of intent is present, the writing, though "unpublished", suffices as an overt act:

> In Mr. *Sidney's* case it was said, *Scribere est agere*. This is undoubtedly true under proper limitations, but it was not applicable to his case. Writing being a deliberate act and capable of satisfactory proof certainly may, under some circumstances, *with publication*, be an overt act of treason: and I freely admit, that had the papers found in Mr. *Sidney's* closet been plainly relative to the other treasonable practices charged *in the indictment*, they might have been read in evidence against him, though not published.
>
> The papers found in Lord *Preston's* custody, those found where Mr. *Layer* had lodged them, the intercepted letters of Doctor *Hensey*, were all read in evidence as overt acts of the treason respectively charged on them; and *William Gregg's* intercepted letter might, in like manner, have been read in evidence, if he had put himself upon his trial. For those papers and letters were written in prosecution of certain determinate purposes, which were all treasonable and then in contemplation of the offenders, and were plainly connected with them. But papers not capable of such connection, while they remain in the hands of the author unpublished, as Mr. *Sidney's* did, will not make a man a traitor. Lord *Hale* * * * mentioneth two circumstances as concurring to make words reduced into writing overt acts of compassing the King's death, *that they be published, and that they import such compassing.*

> True it is, that in *Peacham's* case a Ms. sermon, in which were some treasonable passages, found in his study, never, for aught appearing, preached or published or intended to be so, was thought to bring him within this branch of the statute; and accordingly he was found guilty, *but not executed*. For whatever rule the court of King's Bench, where he was tried, might lay down, "many of the judges, saith *Croke*, were of opinion, that it was not treason." This case therefore weigheth very little; and no great regard hath been paid to it ever since.[52]

The reference in the second paragraph of this quotation, to Hale, introduces the familiar confusion, as to whether the overt act must evidence the intent; but in the context of Foster's analysis, it seems a fair inference that he here uses Hale's words—whether rightly or wrongly—to mean that the overt act must be adequately related, by evidence, to the evidence of the plan or design into which the act fits. This same lingering confusion in terminology appears when Foster, referring now to mere spoken words, says, after detailing the reasons already noted as to their general unreliability as evidence,

> And therefore I choose to adhere to the rule which hath been laid down on more occasions than one since the revolution, that loose words, *not relative to any act or design*, are not overt acts of treason. But words of advice or persuasion, and all consultations for the traiterous purposes treated of in this chapter are certainly so.

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[52] *Id.*, 198–199.

> They are uttered in contemplation of some traiterous purpose actually on foot or intended, and *in prosecution* of it.[58]

If the thesis here advanced as to Foster's basic line of analysis is correct, he should more properly say that in the case put, the "loose words" are not adequate evidence of intention, rather than that they are not sufficient overt acts; for in the same passage, it will be seen that he reiterates that mere spoken words are a sufficient overt act when linked to other, satisfactory evidence of a treasonable design into whose execution they fit. That this is a reasonable interpretation of Foster is supported by his comments on *Crohagan's Case,* in which he plainly insists that one must not confuse the appraisal of the adequacy of words as evidence of intent with their sufficiency as an overt act:

> * * * words connected with facts, or expressive of the intention of the speaker, may, under some circumstances, bring him within the statute of treasons. *Crohagan* being beyond sea said, "I will kill the King of *England,* if I can come at him", and the indictment, after setting forth the words, charged, that *he came into* England *for that purpose.*
>
> In this case the words, though laid in the indictment as one of the overt acts, could not be so properly deemed an overt act of treason, as an evidence against the man out of his own mouth, QUO ANIMO *he came into* England. The traiterous intention, proved by his words, converted in action,

[58] *Id.*, 200.

innocent in itself, into an overt act of treason.

Foster criticizes Kelyng for stating this case as involving words alone as an overt act:

> it is true, the words were laid as an overt act, but they were not the *only* overt act laid; for the indictment farther charged, that the man came into *England for the purpose of killing the King.*

And he continues his criticism of Kelyng in terms which clearly establish his distinction between the evidence of intent and of an overt act:

> The author in the same page endeavoureth to put writings and words upon one and the same foot; "Words, saith he, set down in writing are an overt act to prove the compassing the King's death, and words *spoken* are the same thing, *if they be provd*; and words are the natural way for a man whereby to express the imagination of the heart."
>
> His Lordship reasoneth in this passage as if he considered the overt acts, required by the statute, merely as *matters of evidence*, tending to discover the imaginations of the heart. Overt acts undoubtedly do discover the man's intentions; but, I conceive, they are not to be considered merely as evidence, but as *the means made use of to effectuate the purposes of the heart*. With regard to homicide, while the rule *voluntas pro facto* prevailed, the overt acts of compassing were so considered. In the cases cited by *Coke* there were plain flagitious attempts upon the lives of the parties marked out for destruction; and though in the case of the King overt acts of less malignity, and having a more remote tendency to his destruction, are with great propriety

> deemed treasonable; yet still they are considered as *means to effectuate*, not barely *as evidence* of the treasonable purpose. Upon this principle words of advice or encouragement, and, above all, consultations for destroying the King, very properly come under the notion of *means made use of* for that purpose. But loose words not relative to facts are, at the worst, no more than bare indications of the malignity of the heart."[54]

It follows that Foster has no difficulty in contemplating that actions harmless on their face may yet be sufficient overt acts to make out the offense, when linked to adequate evidence of the treasonable design into which they fit. This appears from his reference in the quotation above to Crohagan's coming into England as "an action, innocent in itself", but converted into treason by the evidence of intention. It appears also in his repeated statement that the mere fact of a meeting of several persons, when coupled with evidence that their intention in meeting was to plan the king's death, is a sufficient overt act; and in his approval of the doctrine that attendance at a meeting with knowledge of its treasonable purpose, or return to a meeting after knowledge is gained of its treasonable purpose, is treason and not merely misprision of treason.[55]

Foster's discussion raises the same question noted in connection with Hale, whether, since his analysis refers almost entirely to problems under that branch of the Statute of Edward III dealing

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[54] *Id.*, 202, 203.

[55] *Id.*, 195, 206; see also matter quoted at note 50, *supra*, and note 56, *infra*.

with compassing the king's death, it extends as well to the crimes of levying war or adhering to enemies. There is material in Foster's discussion of the first offense which may reasonably be construed to mean that he viewed it as of specially broad scope, perhaps validating as overt acts conduct more remote from the intended object than in the other crimes:

> The antient writers, in treating of felonious homicide, considered the felonious intention manifested *by plain facts*, not by bare words of any kind, in the same light in point of guilt, as homicide itself. The rule was *voluntas reputatur pro facto:* and while this rule prevailed, the nature of the offence was expressed by the term *compassing* the death.
>
> This rule hath been long laid aside, as too rigorous in the case of common persons. But in the case of the King, Queen, and Prince, the statute of treasons hath, with great propriety, retained it in it's full extent and rigour: and in describing the offence hath likewise retained the antient mode of expression * * *
>
> * * * * * * *
>
> The principle upon which this is founded is too obvious to need much enlargement. The King is considered as the head of the body-politick, and the members of that body are considered as united and kept together by a political union with him and with each other. His life cannot, in the ordinary course of things, be taken away by treasonable practices without involving a whole nation in blood and confusion; consequently every stroke levelled at his person is, in the ordinary course of things, levelled at the publick tranquility. The

law therefore tendereth the safety of the King with an anxious concern, and, if I may use the expression, with a concern bordering *upon jealousy*. It considereth the wicked imaginations of the heart in the same degree of guilt as if carried into actual execution, from the moment *measures appear to have been taken to render them effectual:* and therefore, if conspirators meet and consult how to kill the King, though they do not then fall upon any scheme for that purpose, this is an overt act of compassing his death; and so are all means made use of, be it advice, persuasion or command, to incite or incourage others to commit the fact, or to join in the attempt; and every person who but assenteth to any overtures for that purpose will be involved in the same guilt.[56]

It is in this connection that he first mentions *Lord Preston's Case*:

> Offences which are not so personal, as those already mentioned, have been with great propriety brought within the same rule; as having a tendency, though not so immediate, to the same fatal end; and therefore the entering into measures in concert with foreigners and others in order to an invasion of the kingdom, or going into a foreign country, or even purposing to go thither to that end *and taking any steps in order thereto*,—these offences are overt acts of compassing the King's death.[57]

However, his approval of the scope of the ruling there is given in terms of implying that he is fully ready to see the same liberality applied to traffic

[56] *Id.*, 193, 194–195.
[57] *Id.*, 196.

with an external enemy, whenever it can be brought under another branch of the statute:

> The offence of inciting foreigners to invade the kingdom, is a treason of signal enormity. In the lowest estimation of things and in all possible events, it is an attempt, on the part of the offender, to render his country the seat of blood and desolation; and yet, unless the powers so incited happen to be actually at war with us at the time of such incitement, the offence will not fall within any branch of the statute of treasons, except that of compassing the King's death: and therefore, since it hath a manifest tendency to endanger the person of the King, it hath, in strict conformity to the statute, and to every principle of substantial political justice, been brought within that species of treason of compassing the King's death: *ne quid detrimenti respublica capiat.*[35]

In the light of this comment, it is impossible to think that Foster would hold that the same action held a sufficient overt act of compassing the king's death, in *Lord Preston's Case*, was not equally good to make out the offense of adherence to the king's enemies, given the other requisite circumstances. This is made clear by his adducing the indictment in that case, with approval, as an example of the fact that, contrary to Coke's mechanical logic, an offense falling under one branch of the statute may be deemed an overt act of a different type of treason:

> * * * in *Lord Preston's case*, before cited, he and the other gentlemen were in-

[35] *Id.*, 196–197.

> dicted upon both branches of the statute, *compassing the death, and adhering;* and the composing, procuring, and secreting the treasonable papers, their taking boat to go on board the smack, and carrying the papers with them in order to be made use of in *France* for the treasonable purposes charged in the indictment,—these facts were all laid as overt acts of *both* species of treason.[39]

That Foster would not require a stricter showing of an overt act in the crimes of levying war or adherence to enemies than in that of compassing the king's death, is further indicated by his strong approval of the doctrine that the former offenses, as much as the last, are made out, where it is attempted to send supplies or information to rebels or enemies,

> though the money or intelligence should happen to be intercepted: for the party in sending did all he could; the treason was complete *on his part, though it had not the effect he intended.* [citing cases]
>
> The cases cited * * * did not in truth turn singly upon the rule here laid down, though I think the rule may very well be supported. For *Gregg* was indicted for *compassing the death* of the Queen, and also for *adhering to her* enemies; and *Hensey's* indictment was in the same form, and so was Lord *Preston's* * * *; and the writing and sending the letters of intelligence, which, in the cases of *Gregg* and *Hensey, were stopped at the post-office*, was laid as an overt act of both the species of treason: so that admitting for argument's

[39] *Id.*, 197-198.

> sake, which is by no means admitted, that it was not an overt act of *adhering*, since the letters never came to the enemy's hands and consequently no *aid or comfort* was actually given, yet the bare writing and sending them to the post-office, in order to be delivered to the enemy, was undoubtedly an overt act of the other species of treason. In *Gregg's* case the judges did resolve, that it was an overt act of both the species of treason charged on him; and in *Hensey's* the court adopted that opinion and cited it with approbation.[60]

As was suggested in the discussion of the same point in Hale, it would seem a difficult argument to maintain, that, at least in the case of trafficking with enemies in time of war, the safety of the state demanded less broad definition of the overt act in the case of adherence to enemies than in that of compassing the king's death. There is nothing in Foster's chapter on levying war or adhering to enemies which suggests a policy of more closely limiting the scope of those offenses, except for his evident caution regarding the broad extension of the concept of constructive levying of war as a means to proceed against purely domestic disturbances.

However, the specific issue, whether a meeting with intention to plan treason, is a sufficient overt act of levying war or adhering to enemies, is not clearly resolved in Foster. He does not discuss the doctrine of previous writers, that a conspiracy to levy war is not a sufficient overt act to establish that particular offense, though he does declare it to be a sufficient overt act in com-

[60] *Id.*, 217-218.

passing the king's death. However, developing a brief reference in Hale, Foster states a rule regarding the trial of accessories in treason which may imply that a meeting is not an adequate overt act to establish the crimes of levying war or adhering to enemies. Though in treason all are principals, as concerns the degree of guilt and of punishment, he argues that, except where the charge is compassing the king's death, one accused of advising or encouraging the commission of another of the treasons should be tried only after the principal actor:

> For instance, *A.* adviseth *B.* to counterfeit the King's coin or seals, or indeed to commit any of the offences declared treason by the 25 *Edw.* III, and furnisheth him with means for that purpose: (that species of treason which in judgment of law falleth within the clause of compassing the death of the King, Queen, or Prince always excepted:) if *B.*, in consequence of this advice and encouragement, doth the fact, *A.* is a principal in the treason; for such advice and assistance in the case of felony would have made him an accessary before the fact; and in high treason there are no accessaries, all are principals. But if *B.* forebeareth to commit the fact, to which he is incited, *A.* cannot be a traitor merely on account of this advice and encouragement, though his behavior hath been highly criminal; for bare advice or incitement, how wicked soever, unless in the cases already excepted, will not bring a man within the statute, where no treason hath been commited in consequence of it.
>
> * * * * *
>
> * * * with regard to every instance of

> incitement, consent, approbation, or previous abetment in that species of treason which falleth under the branch of the statute touching the compassing of the death of the King, Queen, or Prince, every such treason is in it's own nature, independently of all other circumstances or events, a complete overt-act of compassing; though the fact, originally in the contemplation of the parties, should never be effected, nor so much as attempted * * *.[81]

Blackstone is disappointing in his analysis of the nature of the overt act in treason, and gives us nothing but summary restatements of the authorities which we have already examined. In view of the influence of his work in America, however, it is worth while to notice the points which he particularly makes. The desirability of a policy restrictive of the scope of the offense is briefly stated in familiar terms, with the addition of a quotation from Montesquieu, which subsequently also turns up in James Wilson's law lectures in Philadelphia in 1790.[82] An overt act must be

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[81] *Id.*, 210, 342, 346. Coke does not discuss this question. 1 Hale 613, may imply this point, though Emlyn's pointed reference to the ruling in Somerville's case, 1 Anderson 109, on the distinction regarding a charge of compassing the king's death, indicates that Hale's editor believed that the learned author had overlooked the matter. 4 Blackstone 35–36 makes the point that the aider in compassing the king's death has *ipso facto* committed the principal crime. Concerning Foster's underlying caution regarding the scope of constructive levying of war, see Foster, 216.

[82] Blackstone, 75, 83, 85, 86. At p. 86 is the reference to "newfangled" treasons, which seems probably behind Madison's similar reference in *The Federalist*.

shown under each branch of the Statute of Edward III.[83] There is no satisfactory analysis of the distinction between the evidence of intent and that of the overt act, the statement of the problem being put with an ambiguity which we have seen begin with Staundford:

> But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or *overt*, act. And yet the tyrant Dionysius is recorded to have executed a subject, barely for dreaming that he had killed him; which was held for a sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law; and therefore in this, and the three next species of treason, it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon * * *[84]

Likewise ambiguous, is his explanation that "words spoken amount only to a high misdemeanor, and no treason", in which he mingles criticism of their unreliability as evidence in general, and as evidence of intent in particular, with the usual distinction that "scribere est agere".[85] There is, at any rate, nothing in Blackstone clear enough to cast material doubt on the analysis which we have seen in Foster. And Blackstone goes so far toward recognizing the distinction between the overt act and the evidence of intent, as to approve the rulings that a mere

[83] *Id.*, 79.
[84] *Ibid.*
[85] *Id.*, 79, 80.

meeting is a sufficient overt act, where there is evidence of the intent therein to plot the king's death; and that the mere fact of attendance at a meeting known to be treasonable, or the fact of return to a meeting once such knowledge has been gained, make out treason.[66]

(c) Treatises Published in the 19th and 20th Centuries[67]

For all practical purposes, detailed analytical treatment of the law of treason has not interested

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[66] *Id.*, 79, 120.

[67] This section is based on the works hereafter listed. Only those books examined which contained some significant reference to the subject are noted.

Archbold's Pleading, Evidence & Practice in Criminal Cases (31st ed. Butler and Garsia, editors. London, 1943).

Crabb, History of English Law (1st Am. Ed. Burlington, 1831).

Chitty, Practical Treatise on the Criminal Law (3 vol. 2d ed. London, 1826) (4th Am. ed. Springfield, 1841).

East, Treatise of the Pleas of the Crown (2 vol. London, 1803) (Philadelphia, 1806).

Holdsworth, History of English Law (2d ed. 12 vol. London, 1937).

Jenks, Short History of English Law (5th ed. London, 1938).

Luders, Considerations on the Law of High Treason in the Article of Levying War (Bath, 1808).

Plucknett, Concise History of the Common Law (3d ed. London, 1940).

Pollock and Maitland, History of English Law (2 vol. Cambridge, 1895).

Reeves, History of the English Law from the Time of the Saxons to the End of the Reign of Philip and Mary (4 vol. London, 1814–1829).

Stephen, History of the Criminal Law of England (3 vol. London, 1883).

Stephen's Commentaries on the Laws of England (4 vol. 18th ed. London, 1925).

writers of standard texts since the 18th century; and we have only meager evaluations of the issues of policy involved even from the historians. This is a natural reflection of a period of great political stability, and the Victorian confidence in an ordered world, in which civilization was identified with western Parliamentary government, speaks with naive assurance in Sir James Fitzjames Stephen's apology for the extremes of 16th and 17th century "treasons":

> All these acts were either temporary, or have in one way or another long since expired, and they exercised little or no permanent influence on our law. I have referred to them so fully partly on account of their historical interest, partly because they illustrate in a striking manner the nature of one class of political offences. Convulsions and revolutions have occurred in the history of every nation. Each party in turn, and in particular every successful party, is from the nature of the case obliged to treat the prosecution by their antagonists of the political views and objects which they have at heart, and even in some cases the open avowal of those views, as crimes of the highest nature. It seems to me that such legislation can be fairly criticised only by considering two things, namely, first, the substantial merits of the quarrel, and secondly, the efficiency and approach to necessity of the means employed for the attainment of the end proposed. The Reformation and the great political revolutions which have followed it were the stormy periods in human history, and the legislation by which different parties have done their best to maintain their respective views in their own dominions,

> are like orders given by a military commander in time of war. To criticise them upon the false supposition that they were intended to last for an indefinite time, and to apply to the normal state of society, is to misunderstand them pedantically.[68]

The 19th century historians introduce a desirable realism into the discussion of the policy bases of the Statute of Edward III, when they point out that the Parliament's wish to limit the definition of "treason" seems to have stemmed rather from the urge to limit the occasions on which land would forfeit directly and finally to the King, than from any notion of preserving political liberties.[69] But, while noting the politically liberal tradition which became attached to the Statute of Edward III, the typical 19th century discussion does not find it necessary to spend upon this theme the eloquence of great conviction. The alert vigilance of the Philadelphia convention of 1787 seems to have little counterpart in this succeeding period. The historians do, however, focus on the field of domestic politics as the area in which the restrictive policy of the Statute of Edward III has its modern importance.[70] But they place equal

[68] 2 Stephen 262–263; *cf. id.* 251. It may be significant that Stephen begins his discussion with a strong assertion of the importance of defending the basic organization of the community. *Id.*, 241–242; *cf.* 4 Holdsworth 493.

[69] Luders, 10; 2 Stephen 247; 2 Pollock and Maitland 508; 2 Holdsworth 449.

[70] 3 Reeves, 207, 208, 217, 234–235; 4 *id.* 273, 281, 297; 2 Stephen 247 ("Probably the great importance of the Act of Edward as a protection to what we should now call political agitation and discussion, was hardly recognized till a much later time."); 2 Pollock and Maitland 508; 3 Holdsworth 287, 290, 291; 8 *id.* 309; but *cf. id.* 310.

stress on the importance of protecting the existence of the state, and in this view find the terms of the Statute of Edward III to be "worded too narrowly, if it is to be construed literally."[71]

The post-18th century writers add nothing to clarify the analysis of the overt act element of the crime. There is recognition that the overt act is a separate element in the offense; indeed, this is so plainly established, in net, by the earlier treatises that it could scarcely be subjected to open question at this date.[72] But the familiar ambiguous language, describing the function of the overt act as being to "prove", "manifest", "declare" the treason, is scattered through all of these works; and some of them contain references which would suggest that, at least in borderline cases, the overt act must be some evidence of treasonable intent.[73] It is also, however, a fair summary of the evidence to say that this latter

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[71] 2 Stephen 263; 4 Holdsworth 496, 498; 8 *id.* 310.

[72] 3 Reeves 408; 5 *id.* 104; 1 East 58; 4 Stephen's Commentaries 150; Archbold 1067, 1073, 1077.

[73] See 1 East 69, 119; 4 Stephen's Commentaries 150; 8 Holdsworth 309, 311, 315; *cf. id.* 317. From the fact that this ambiguous terminology is almost invariably used in analysis of the offense of compassing the king's death, one might infer that the writers regard the overt acts involved in the other branches of treason to be so clearly evidence of treasonable intent as not to require such comment. But *cf.* A Treatise upon the Law and Proceedings in Cases of High Treason, &c., By a Barrister at Law (London, 1793: printed as an appendix to Kelyng's Crown Cases—reprint, Lond. (1873) 106: "If the treason consists not in the intention, but in the act, as levying war, then it must be laid to have been done traiterously", citing *Cranburn's Case*, 2 Salk. 633.

theory never emerges beyond the stage of innuendo or implication, in the post-18th century writings. And there is recognition that, at least under the charge of compassing the king's death, conduct indifferent on its face, notably mere meetings, may be a sufficient overt act, when linked to proper evidence of treasonable intent. The only references to ambiguous or indifferent conduct as overt acts come under this head of compassing the king's death, and though the writers do not attempt to spin any very explicit theory of the special breadth of this charge, it is quite clear that they all regard it as the broadest category of treason. Holdsworth comes closest to open disapproval, on policy grounds, of the idea that "harmless" conduct may suffice for the overt act element, and he implies emphasis on the fact that the broadest cases have been under the charge of compassing the king's death. This seems the undertone of his comments on *Croghagan's Case:*

> * * * the court seems to have laid some stress upon the facts that the words were accompanied by the overt act of coming to England, and that he had used scornful words when arrested; and this is the manner in which the case was explained and justified by later lawyers. It followed that words could give a treasonable colour to an otherwise innocent overt act. It is, therefore, not surprising that, in 1660, the judges showed a tendency to minimize the importance of the difference between written and spoken words * * *.[a]

[a] 8 Holdsworth 316.

This underlying unfriendly note appears also in his comments on *Lord Preston's Case*:

> But, except in these two cases [spoken or unpublished written words not linked to a treasonable design], the seventeenth-century decisions, extending the constructive interpretation of this clause, were adopted, and even carried further, after the Revolution. And, here again, the extension was probably inevitable. If a conspiracy to levy war, and the publication of a writing advocating the deposition of the king, or merely arguing that it is lawful to depose him, are overt acts which can be given in evidence to prove the compassing of his death, it will be difficult to draw the line at these acts. It will be difficult to rule out any acts done in preparation for any other act, which, if accomplished, will be an overt act. That no attempt was made to draw the line is clear from the case of Lord Preston.

Quoting Foster's summary, that "Every step taken for those purposes was an overt act", he further comments:

> The last sentence contains the gist of the matter. It comes to this—every act, however remotely connected with an overt act of compassing the king's death, is itself an overt act. As the future Lord Eldon contended, when, as attorney-general, he was prosecuting Hardy in 1794, any act which showed that the person doing it intended "to put the king in circumstances in which, according to the ordinary experience of mankind, his life would be in danger," might be given in evidence as an overt act of compassing his death. It followed that this clause of the statute could be made to

> cover the ground covered both by the clause against levying war against the king, and by the clause against adhering to his enemies.
>
> * * * * *

Those remarks should be compared with the same author's emphasis on the basically broader character of the statutory terms regarding the offense of compassing the king's death:

> Even in the mediaeval period, the judges had seen that the fact that the gist of the offence was an intention to kill the king,

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Id. 317-318. Compare 2 Stephen 267, which mentions Lord Preston's Case with the comment that "After the Revolution of 1688 the fictitious interpretation of the offence of compassing the king's death was carried much further than it had been under the Stuarts." He states that in the passage from Foster, quoted at note 57, *supra*, that author "proceeds to carry the law laid down in [Lord Preston's Case] * * * a step further", underlining the last clause of Foster's paragraph, and continues:

> Foster follows Coke and Hale in holding that "levying war" is an overt act of compassing, and that conspiring to levy war in one sense of the expression is so too. Indeed, he goes so far as to say that "a treasonable correspondence with the enemy" is an act of compassing the king's death, and he refers in support of this to Lord Preston's case, and also to the case of one Harding, in which it was held on a special verdict that enlisting men in England and sending them abroad to join the French forces in an attempt to dethrone King William III was an imagining of his death.

Neither Stephen nor Holdsworth takes note of the fact that the overt acts laid in Lord Preston's case were under a charge of adhering to the King's enemies as well as of compassing his death. See notes 58 and 59, *supra*.

> could be used to extend its scope; for they had held that the mere speaking of words might be an overt act which evidenced such an intention. They had seen as clearly as their successors that such an intention can be proved only by overt acts, "for the thought of man is not triable"; and that the statute could be extended by inferring an intention to kill from overt acts which were only remotely connected, if they were connected at all, with a formed intention to kill the king. * * *
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> * * * the fact that it was the intention to kill the king, and not his murder, which was made treason, was the main reason why this clause could be so extensively construed. * * *[16]

To fill out the picture it may be worth noting that, referring to the crime of adherence to the king's enemies, Holdsworth points out that this clause "has not been extended by construction in the same way as the first two clauses."[17] He makes no argument, however, to show that there are policy considerations supporting this divergence in the history of the various branches of the Statute of Edward III. Archbold does indicate a

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[16] 8 Holdsworth 309, 311.

[17] *Id.*, 307. Compare 2 Stephen 282: "Instances of this offence have been very rare in our history. England, owing to its insular position, has not for centuries been the scene of war carried on with a foreign enemy * * * Hence the offence of 'adhering to the king's enemies'—an exceedingly vague expression—has been committed only by a few spies who have in the time of war been detected in giving information to foreign enemies * * * No questions of legal or constitutional interest have arisen on this branch of the act of Edward III to my knowledge."

difference in scope between the crime of adhering to enemies and that of compassing the king's death, when he asserts that a conspiracy to adhere is not treason under that branch of the statute any more than is a conspiracy to levy war under the levying provision. But he cites no direct authority for his assertion.[*] The specially

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[*] Archbold 1076. His further comments suggest that he draws this conclusion from rulings on the effect of a conspiracy to levy war; for he declares that a conspiracy to adhere to enemies may probably be laid as an overt act of compassing the king's death, and that

> if the prosecution can prove such a conspiracy [to adhere], and connect the prisoner with it by evidence, and can prove an act done by any one of the conspirators in furtherance of the common design, it may be given in evidence against the prisoner, if it tends to prove any of the overt acts laid in the indictment; for the act of one, in such a case, is the act of all: *R. v. Stone*, 25 St. Tr. 1115; 6 T. R. 527 * * *

"A conspiracy to aid or comfort the king's enemies is not within the act," according to A Treatise upon the Law and Proceedings in Cases of High Treason, *op. cit. supra*, note 73, p. *41. This work cites 3 Inst. 9, and 6 Ba. Abr. 5th ed. 516, the latter in turn relying on Coke, Hale, Pleas of the Crown 13, 14 (the one volume work preceding the History), and 1 Hawkins, P. C. c. 17, sec. 27 for the same proposition. Coke, Hale, and Hawkins, however, discuss only conspiracy to levy war, in the passages relied on; and in no others do they appear to support the doctrine for which they are here cited.

3 Holdsworth 288 points out a probable historical explanation for the omission of conspiracy to levy war as a branch of treason under the Statute of Edward III:

> As is well known, there is no mention in the statute of a conspiracy to levy war; and, as Maitland points out, [2 Pollock and Maitland 503, 504; but this refer-

broad scope of the crime of compassing is stressed to some extent in East's development of Foster's argument that under that heading it is not neces-

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ence actually discusses only the reason for the late recognition of the crime of levying war against the king], this is probably due to the fact that such a conspiracy was hardly regarded as an offence if the war was properly declared.

That is, the feudal bond was in law a reciprocal one, of rights and duties, so that the vassal had a right in some cases to war upon a lord who had broken the bond. Thus, the omission of conspiracy in the statutory definition would not in its origin reflect any policy relevant to present use of the Statute. *Cf.* 2 Hallam, Constitutional History of England (London, 1827) 501.

2 Chitty 69, 73 gives as a sufficient count for adhering to enemies the following allegations, which might be deemed broad enough to include a meeting with an enemy agent as a sufficient overt act of adherence:

> And further, &c. * * * He the said William Stone, as such false traitor as aforesaid, during the said war, to wit, on, &c. and on divers other days as well before as after that day, at, &c. aforesaid, well knowing the said William Jackson traitorously to have come to and landed in this kingdom, for the traitorous purpose of procuring and obtaining intelligence and information whether the subjects of our said lord the king were or were not well affected to our said lord the king and his government, and were or were not likely to join with and assist the forces of the said persons exercising the powers of government in France, and being enemies of our said lord the king as aforesaid, in case an hostile invasion of this kingdom should be made by them for the prosecution of the said war against our said lord the king, and of sending and causing to be sent such intelligence and information to the said persons exercising the powers of government in France, and being enemies of our

sary to postpone the trial of an aider and abetter until the conviction of the principal actors, since advising the king's death is itself the main offense." It is only from such unsatisfactory scraps that one can weave any theory of these writers on the nature of the overt act element, however.

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said lord the king, as aforesaid, for the aid, assistance, direction, and instruction of the said enemies of our said lord the king, in their conduct and prosecution of the said war against our said lord the king, did, with force and arms, maliciously and traitorously receive and treat with the said William Jackson, at, &c. aforesaid, for the aid, assistance, and direction of the said William Jackson, in the prosecution, performance, and execution of his traitorous purpose aforesaid, and did then and there maliciously and traitorously aid, comfort, abet, and assist the said William Jackson in, about, and concerning the prosecution, performance and execution of his the said William Jackson's traitorous purpose aforesaid.

[10] East 100; *cf. id.*, 58. However, the argument that compassing was always a peculiarly broad offense due to ideas no longer prevailing, regarding the special protection of the King's person, is somewhat rebutted by the emphasis which is put on concern for the King, not as a person, but as symbol of the ordered community. See, Foster, note 56, *supra*. This also appears in the distinction taken by Hale and East between the scope of the crime as applied to the king and to his queen or heir apparent. 1 East 65 thus says, of the crime of compassing the death of the queen or of the eldest son and heir:

> As to what shall be said to be an overt act of compassing their death: it must be such as shews an unlawful intent against their *persons*, and not merely against their *state and dignity*. Therefore much of what has been already said concerning overt acts of compassing the death of the king, which are specifi-

Writers on the Constitution[m]

It is probably significant of a felt connection with fundamental policies in the conduct of politics that most of the post-18th century writers on

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cally appropriate to him and his sovereign power and royal dignity, does not apply to the queen or prince. Thus a compassing to imprison or otherwise punish them by due course of law is not within the statute; but a compassing to wound them is.

See 1 Hale 127–128.

[m] This paragraph is based on examination of the following works, among others. Only those containing some substantial discussion of the subject are noted.

Anson, The Law and Custom of the Constitution (3d ed. 3 vol. Oxford, 1907).

Chalmers and Asquith, Outlines of Constitutional Law (5th ed. London, 1936).

Hallam, The Constitutional History of England (2 vol. London, 1827).

Jolliffe, Constitutional History of Medieval England from the English Settlement to 1485 (London, 1937).

Keir, Constitutional History of Modern Britain 1485–1937 (2d ed. London, 1943).

May, Constitutional History of England (3 vol. London, 1912).

Morris, Constitutional History of England to 1216 (N. Y., 1930).

Smith, History of the English Parliament (2 vol. London, 1892).

Stubbs, Constitutional History of England (3 vol. 6th ed. Oxford, 1897).

Tanner, Tudor Constitutional Documents A. D. 1485–1603 (Cambridge, 1930).

Taswell-Langmead, English Constitutional History (9th ed. London, 1929).

Thomson, A Constitutional History of England (4 vol. London, 1938).

the English constitution bring the law of treason into their discussions. The majority of these commentators are laymen, and in all of these works the treatment of the elements of the crime merely derives from authorities already examined, and casts little additional light thereon. But, it is worth noting, as evidence of a prevailing climate of opinion, that these books firmly entrench the notion of the Statute of Edward III as a desirable delimitation of a dangerously vague field,[81] and that with striking uniformity they emphasize the danger of abuse of broad categories of "treason" in the arena of domestic politics.[82] As a concrete expression of this general attitude, there appears a general, if ill-defined, condemnation of "constructive" treasons; and it is especially interesting to see that *Lord Preston's* Case, in its rulings on the sufficiency of the overt acts, is cited as the extreme point of extension of construction—representing "the fictitious interpretation of the crime of compassing."[83] Hallam alone, however, expressly insists on linking the overt act to the showing of intent.[84]

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[81] 2 Anson 243; 2 Hallam 499; Jolliffe, 446–447; 1 Smith 211; Taswell-Langmead, 242, n.

[82] Jolliffe, 446; Keir, 107, 213; 2 May 45, 55, 72 (though, *cf. id.*, 43); 2 Smith 340; 3 Stubbs 290, 537; Tanner, 379; Taswell-Langmead, 348.

[83] Tanner, 377, note 2; *cf.* 4 Thomson 284.

[84] See 2 Hallam 546:

> In the vast mass of circumstantial testimony which our modern trials for high treason display, it is sometimes difficult to discern, whether this great principle of our law, requiring two witnesses to overt acts, has

2. STATUTORY EVIDENCE OF ENGLISH POLICY REGARDING TREASON

In a very general sense, the statutory history of the law of treason in England may be said to evidence a strong, long-run policy restrictive of the scope of that offense. With reference to the extent of the three branches of treason which have been of the greatest continuing importance—compassing the king's death, levying war against him, and adhering to his enemies—the policy evidenced in the legislative history is less clearcut.

25 Edward III, Statute 5, Chapter 2 (1350) represented a very definite decision to limit the area of crimes to be called "treason". Comparison of the act with the earlier common law, and with the Parliamentary petition which gave rise to it, makes this plain; and the fact that the motive may have been to limit the occasions on which land would forfeit directly and irrevocably to the

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been adhered to: for certainly it is not adhered to, unless such witnesses depose to acts of the prisoner, from which an inference of his guilt is immediately deducible.

Cf. 1 *id.* 177, n. In the light of the quoted comment, and as evidence of the inherent ambiguity of those statements which assert that the act must "manifest" treason, it is interesting to note that elsewhere Hallam says that

> The crime of compassing and imagining the king's death must be manifested by some overt act: that is, there must be something done in execution of a traitorous purpose.

2 *id.* 505. In this latter statement, clearly the meaning is that the act must "manifest" the intent in the sense of translating thought into deed.

king, rather than to protect freedom of political processes, or the liberty of the subject, does not alter the restrictive character of the statute.[55] Moreover, during the creative years when the law of treason was under appraisal with reference to its political implications, the restrictive character of the Statute of Edward III was treated as a matter of political policy, and it is in that light that the words of the Statute became part of the politico-legal inheritance of the American colonies.[56] Following the periods of greatest excess in domestic political controversy, in which both legislative and judicial extensions of the concept of "treason" were carried to points ever thereafter criticized, there was an invariable return in the period of calm to the Statute of Edward, treated as the expression of a sound political

[55] On the common law, see 2 Stephen 243–247; 2 Pollock and Maitland 506–508; 3 Holdsworth 287–291. On the economic motive for the passage of the Statute, see Luders, 10–11; 2 Stephen 247; 2 Pollock and Maitland 508; 2 Holdsworth 449. That the Statute is a limiting act, see, in the discussion of English treatises, notes 5, 6, 30, 48, 62, 79. The Statute furnishes its own evidence of the generally restrictive intent behind it, in its express exclusion from the scope of treason of certain types of cases which had been dealt with as treasonable at common law, in its explicit reservation of the lord's right of escheat in petit treason, and in the stipulation that the judges must hereafter leave novel cases to the judgment of Parliament, or at least of the House of Lords. See 3 Holdsworth.

[56] See passages cited, in the discussion of English treatises, from Coke (notes 5, 6), Hale (notes 30, 31), and Foster (note 48).

limitation."[87] Thus today, except for the statutes of 1 and 6 Anne protecting the succession as established by the Revolution of 1688, the Statute of Edward III defines the only types of "treason" recognized by English law.[88]

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[87] 2 Stephen 251; 3 Holdsworth 287. Stephen takes a sceptical view of the reality of the restrictive policy evidenced in the Statute:

> In quiet times it is seldom put in force, and if by any accident it is necessary to apply it, the necessity for doing so is obvious. For revolutionary periods it is obviously and always insufficient, and at such times it is usually supplemented by enactments which ought to be regarded in the light of war measures, but which are usually represented by those against whom they are directed as monstrous invasions of liberty. The struggle being over, the statute of 25 Edw. 3 is reinstated as the sole definition of treason, and in this way it has become the subject of a sort of superstitious reverence.

[88] See Archbold, 1056-1065. As is hereafter noted in the text, the only substantive changes which have continued are in further definition of the classic categories of the crime. Other statutory changes are procedural. Compare the proposal of the Criminal Code Commission, quoted in 2 Stephen 283.

The Treachery Act, 1940 (see Hailsham's Laws of England, Supplement 1943, paragraph 431), does not appear to modify the proposition stated in the text. In terms an emergency enactment, to expire when an Order in Council shall declare the emergency ended, this statute is almost entirely concerned with relieving the prosecution of the procedural restrictions of previous treason legislation and with tightening the penalty. It affects the scope of the crime, so far as the element of betrayal of allegiance is concerned, by extending its penalty to alien enemies. The conduct prohibited seems to amount only to such as would

Little guidance towards sound policy in the definition of "treason" and the overt act element in the offense is to be found in the legislation which went beyond the terms of the Statute of Edward. It is a fact that the overt act element was dispensed with in several statutes which declared it treason merely to hold certain opinions or beliefs, against the rightful title of the king to his authority, or in favor of the powers asserted by the pope, or to refuse to take a test oath.[89] It is likewise a fact that in troubled times statutes resolved the border line questions of spoken or written words as sufficient overt acts, by declaring treasonable the speaking or writing of similar opinions as well as of certain types of persuasion to action.[90] But this legislation has been regarded as extensions of the crime beyond the limits of the Statute of Edward and not as parliamentary

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plainly be covered by the charge of adherence to enemies, except as the scope of the crime may be affected by the provision penalizing the doing or attempting of any act "which is designed *or likely* to give assistance to the naval, military, or air operations of the enemy * * *." [Italics added.] The precise effect of this last stipulation is not clear. Certainly, it would not be construed to eliminate *mens rea*, since the Act begins by requiring a showing of intent to aid the enemy; on the other hand, it may serve to prevent a defense argument that a slim chance of success argues lack of real intent. Whatever its implications for the intent element, this phrase implies also a conception of an overt act as one tending to translate ideas into execution. See Davies, The Treachery Act, 1940, (1941) 4 Modern Law Rev. 217; (1940) 4 Jour. Crim. Law 304; (1940) 104 Just. P. 342; *cf.* (1941) 105 *id.* 178.

[89] See statutes discussed in 4 Holdsworth 493–496.

[90] Ibid.

interpretations of its terms.[91] Moreover, the extensive legislation not only lacks relevance as an interpretation of the classic definition of treason, but also as a guide to its underlying policy. For this crisis legislation on its face expresses the broadest, drag-net policy of preventive and protective solicitude for the Crown; and in no respect is this more obvious than in the elimination or minimizing of the overt act element in the crime. Likewise, on its face, this legislation expresses policy determined in the light of very specific problems of a questioned succession and the challenge of papal authority. In contrast, the Statute of Edward was in origin a restrictive act, and it has entered the English Constitution with the gloss of centuries of political thought, as a guaranty of free political processes. Its terms have the breadth of constitutional provisions, and have been in fact regarded as an expression of principle and not as *ad hoc* reactions to the threat of Pope or Pretender. So far as its particulars are concerned, commentators from Coke on have treated as a basic characteristic of the Statute its emphasis on the overt act as a distinct element of the offense, and legislation which frankly departs from this emphasis can only be regarded as springing from a wholly different view of policy.

One type of legislation extending the usual limits of the Statute of Edward is enough on the border line between the familiar and the alien to deserve note, however. The Act of 3 William and Mary, Chapter XIII ("An Act against cor-

[91] 2 Stephen 263, 265; 4 Holdsworth 493; *cf.* 1 Hale 261.

responding with Their Majesties Enemies"), provided:

> For preventing of the Traiterous Correspondence and Comerce with the French King or his Subjects and supplying them with Warlike or other Stores or Comodities by means of which they may be any way aided or comforted in carrying on their War against Their Majesties Be it declared and enacted * * * That if dureing the present War between Their Majesties and the French King any person or persons shall send or load or transport or deliver or cause to be sent or loaden or transported or delivered unto or for the Use of the said French King or any of his Subjects residing within his Dominions or any Towne or Territory in his possession or into or for any Port or Place within his said Dominions any Arms Ordnance Powder Bullets Pitch Tarr Hemp Masts Cordage Iron Coales Lead or Salt-Peter that every person or persons so aforesaid offending being legally thereof convicted or attained by due course of Law shall be deemed declared and adjudged to be a Traytor or Traytors and shall suffer Pains of Death and alsoe lose and forfeit as in cases of High Treason.
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> * * * * * *
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> * * * if any of their Majesties Subjects shall from and after the Tenth day of March in the yeare of our Lord One thousand six hundred ninety one without license from Their Majesties voluntarily goe or repaire or imbarque in any Vessell with an intent to go into France or any Dominions of the French [King] and be upon full proof convicted thereof he shall be taken deemed

and adjudged to be guilty of High Treason and shall suffer such Penalties as in case of High Treason.

* * * if any person or persons being Their Majesties Subjects shall after the Five and twentieth day of March in the year of our Lord One thousand six hundred ninety-two voluntarily come or returne from France or any of the French Kings Dominions in Europe into England or any of Their Majesties Dominions in Europe during the said War without Their Majesties leave for that purpose first had and obtained and be thereof convicted by due course of Law shall be comitted to Prison and there closely kept without Bail or Mainprize dureing Their Majesties pleasure for any time not exceeding Twelve Months.

This was in 1691. In 1697–1698, 9 William III, Chapter I ("An Act against corresponding with the late King James and his Adherents") made a similar provision against a danger foreseen as likely to arise after the end of the French war:

Whereas upon the Conclusion of Peace betweene His Majesty and the French King it is become necessary for the carrying on a Trade and Comerce betweene England and France That the Subjects of each Kingdome should have the freedome of [going & coming] out of and into the said Kingdomes respectively And whereas such Persons who have been in Armes against His Majesty or have been engaged in trayterous Conspiracies against His sacred Person and Government and other disaffected Persons may take Advantage and be encouraged from thence to forme and carry on Treasonable Designes and Practices against his Majes-

ties Royal Person and Government unlesse some Provision be made for Prevention thereof Be it therefore enacted. . . . That if any of His Majesties Subjects who have att any time since the Eleventh Day of December One thousand six hundred eighty eight voluntarily gone into France or any of the French Kings Dominions in Europe without License from His Majesty or Her late deceased Majesty Queen Mary of blessed Memory, or who have att any time dureing the late Warr with France borne Armes in the Service of the French King either by Sea or Land or who have att any time since the Thirteenth day of February One thousand six hundred eighty eight been in Armes under the Comand or in the Service of the late King James in Europe shall att any time after the Foureteenth Day of January One thousand six hundred ninety seven returne into this Kingdome of England or any other His Majesties Dominions without Li- from His Majestie under the Privy Seale every Person so offending shall (being lawfully convicted thereof) be taken deemed and adjudged to be guilty of High Treason and shall suffer and forfeit as in Cases of High Treason.

And for preventing trayterous Correspondence between his Majesties Subjects and the late King James or his Adherents Be it further enacted * * * That if any of his Majesties Subjects from and after the said Fourteenth Day of January One thousand six hundred ninety seven without Licence from His Majesty shall within this Realme or without in order to give any Aid or Assistance to the said late King James hold entertaine or keep any Intelligence or Correspondence by Letters Mes-

sages or otherwise with the said late King James or with any Persons imployed by him knowing such Person to be so imployed or shall without Licence from His Majesty by Bill of Exchange or otherwise remitt or pay any Sum or Sums of Money for the Use or Service of the late King James knowing such Money to be for such Use or Service such Person so offending being lawfully convicted shall be taken deemed and adjudged to be guilty of High Treason and shall suffer and forfeit as in Cases of High Treason.

After the recognition by Louis XIV of the title of the son of James II, the act of 13 & 14 William III, Chapter III (1701) further provided that

> * * * for preventing traiterous Correspondence between your Majesties Subjects and the said pretended Prince of Wales or his Adherents Be it further enacted * * * That if any of the Subjects of the Crown of England from and after the First Day of March One thousand seven hundred and one shall within this Realm or without hold entertain or keep any Intelligence or Correspondence in Person or by Letters Messages or otherwise with the said pretended Prince of Wales or with any Person or Persons imployed by him knowing such Person to be so imployed or shall by Bill of Exchange or otherwise remitt or pay any Sum or Sums or Money for the Use or Service of the said pretended Prince of Wales knowing such Money to be for such Use or Service such Person so offending being lawfully convicted shall be taken deemed and adjudged to be guilty of High Treason and shall

suffer and forfeit as in Cases of High Treason.

During the same period, similar legislation was passed as other alarms moved Parliament to action.[92]

Since the conduct punished in the first paragraph of the act of 3 William and Mary (supplying stores of war to the enemy) would seem clearly within the Statute of Edward III, there is some reason to regard this statute as a whole as declaratory of the offense of adherence as applied to the contemporary circumstances, rather than as intended to expand the scope of that offense. The statutes aimed at correspondence with James II and the Pretender seem intended to strike down conspiracy to levy war. Viewed with reference to that branch of the Statute of Edward, they constitute an extension. But by the time of their enactment, conspiracy to levy war was established in the decisions as a sufficient overt act of compassing the king's death; and in this light, the acts of 9 and 13 & 14 William III may reasonably be viewed as declaratory of the offense of compassing, as applied to a contemporary danger. If these statutes may be taken as parliamentary interpretations of the crimes of compassing the king's death and adhering to his enemies, they reflect a broad concept as to the type of overt act which may suffice to make out

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[92] See 2 Stephen 262; 6 Holdsworth 399. See 7 Anne c. 4, sec. xlviii, for a provision penalizing traitorous correspondence by members of the armed forces, obviously the source of the similar provision common in early American militia laws.

those charges. The acts have in common, that they declare treasonable certain overt acts of contact with a foreign or domestic foe, without requiring the showing of a specific intent to betray. Further, in the act of 3 William and Mary, the second quoted paragraph makes it high treason merely to travel or take ship with the intention to go to a country then at war with England, with no requirement of a showing that these acts—certainly as "harmless" on their face as a dinner meeting with a known enemy agent—were done with a specific purpose of adhering to the enemy. The act against adherents of James II creates a treasonable offense based on the simple fact of departure to France after the Revolution of 1688. That legislation made correspondence treasonable only when shown to have been "in order to give any Aid or Assistance to the said late King James"; but the act of 1701 dispensed with this intimation of a specific intent as a necessary element of the offense and held treasonable the mere correspondence with the Pretender, though it apparently does require a showing of specific intent if the charge is the sending of funds. It is interesting to note the weight put in these statutes upon the guilty implications of the fact that the person charged dealt with an agent of the foe, "knowing such Person to be so imployed."

So much for legislation going beyond, or, as in these last cases, perhaps defining the borderland of "treason" as defined in the Statute of Edward III. When one asks what fundamental policy seems reflected in the legislative history of the

three classic branches of treason—compassing the king's death, or adhering to his enemies, or levying war upon him—the answer looks both ways. There has been no statutory tampering with the last two; but the first has been extended. Holdsworth tells the story succinctly:

> In 1795 [36 George III. c. 7 s 1; made perpetual by 57 George III, c. 6 § 1] a statute was passed which, in effect, gave statutory force to the constructions which had been put upon the clause of Edward III.'s statute relating to the compassing of the king's death. It provided that it should be treason to compass: (i) not only the death but also the bodily harm, imprisonment, or restraint of the person of the king, or his deposition; (ii) the levying of war on him either in order to compel him to change his policy, or in order to overawe both or either of the houses of Parliament; (iii) the stirring up of any foreigner to invade any part of the king's dominions; such compassing being evidenced by printing, writing or other overt act. In 1848 [11, 12 Victoria c. 12 § 1; the object of the Act was, by diminishing the penalty, to render it easier 'to prosecute these crimes with success', Kenny, Criminal Law 274] it was in effect enacted that such of the treasons set out in the last cited Act as related to the compassing the death or bodily harm, the imprisonment or restraint of the person of the king, should be treason; and that the other compassings specified in the Act should be felony. But nothing in the Act was to affect the statute of Edward III. ['Provided always * * * that nothing herein contained shall lessen the force of or in any manner affect anything enacted by the stat-

> ute passed in the twenty-fifth year of king Edward III.'] That statute must of course be taken to bear the construction which the judges have put upon it; for there is nothing in this legislation to negative that construction. The result is that the acts made felony by the statute of 1848 could, if the crown wished, be treated as constructive treason by virtue of the Act of Edward III. As Professor Kenny justly says [Criminal Law 274], it is "a singular juridical anomaly that precisely the same action should thus occupy, simultaneously, two different grades in the sphere of crime." This legislation did not touch the clause relating to the levying of war against the king. The result is that the constructive extension of this clause is in no way affected. * * *[93]

Nor, he might have added, does the later legislation in any way affect the clause relating to adherence to the king's enemies. However, there has not been occasion for any notable extension of that clause by construction heretofore. In any case, there is no evidence from which to argue that the statutory extension of the compassing provision carries any implication that the other provisions should be treated more restrictively than they have been before.

Indeed, the fact that the legislative extension of the crime of compassing the king's death has merely codified the gloss which the judges had put on the Statute of 1350, points to the paradoxical character of the policy underlying the definition of "treason". The Statute of Edward III

[93] 8 Holdsworth 321-322; see 2 Stephen 279-281.

is the historic expression of a general policy restrictive of the scope of the offense. But over the centuries the judges have construed the basic terms of the Statute so as to extend the bounds of the crime considerably beyond the *prima facie* meaning of the words.[34] This has been true both of the crimes of compassing the king's death, and

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[34] This contrast between the restrictive character of the Statute of Edward III, viewed in the light of the possible scope of "treasons" outside the limits of those defined therein, and the liberal construction given to the Statute and apparently acquiesced in by Parliament, is overlooked in the sweeping scepticism expressed by Tucker regarding the limiting character of the act:

> There are no negative or restrictive words in the enacting clause of the statute of Edward the third: and the conduct of the judges in England seems to evince an opinion on their parts that the statute is not to be construed so strictly as the learned commentator seems in this place to suppose it ought. [Referring to Blackstone's assertion that the statute "defines what offences *only* for the future should be held to be treason."] Stanford said, expressly, on the trial of sir Nicholas Throgmorton, that there remained divers treasons at common law, at that day (1 Mar.) which were not expressed by that statute. 1 St. Tr. 72. And Bromley, chief justice, said the same thing, in effect. Ibid. 73.

5 Tucker, ed., Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia (Philadelphia, 1803) 75, n. 2; *cf. id.* App., Note "B", pp. 16–17. In the quoted statement, Tucker ignores the fact that in the light of the history of its passage, the Statute, though lacking negative words, placed a clear negative on the previous scope of common law treasons; and the authorities cited by him are not repre-

of levying war against him; and there is no evidence that it has been less true of the provision

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sentative of the trend of authority. *Cf.* 4 Holdsworth 498, n. 1. In his "Note B, Concerning Treason" (vol. 5, pp. 16–17), Tucker expands upon the point he has previously made, in a fashion which, if not good English history, is interesting as a reflection of the restrictive emphasis with which "treason" was viewed in the early years of the Republic:

> It seems to have been taken for granted, that the clause in our constitution, which relates to the crime of treason, is an exact transcript from the statute 25 Edw. III. It may therefore be not amiss to compare them. * * * Upon this statute we may here remark, that there are no negative words in it, as in the constitution of the United States; and that, so far from declaring as that does, that treason shall consist, *only* in the cases enumerated, it expressly supposes that *many other* cases of treason may happen, although the framers of that statute could not then think of them. True it is, such cases were to be reserved for the king and parliament to pass upon, but the violence of succeeding times, and the corruption and complying temper of succeeding parliaments, during a succession of more than two centuries, left but little room for scrupulous judges, had there been any such in those days, to apply for a parliamentary interpretation of any undefined offence supposed to be treason.

Tucker in effect thus brings out the ambiguity which is to be noted as involved in Thomas Jefferson's use, for the purpose of effecting a restrictive policy, of statutory terms to which English judges had given broad constructions. But, as will be pointed out in the discussion of early American treason materials, the fact that this ambiguity lurks, unresolved, in the background, cannot erase the fact that in the eyes of the lawyers and draftsmen of that time the Statute of Edward III represented an instrument for limiting the scope of the offense.

punishing adherence to enemies for any reason except lack of occasion to apply that clause broadly. Parliament has never amended the Statute so as to curb the extended constructions of the judges. There is here a large degree of that irrational quality to be found in many of the legends which form a part of "public policy"; but, so far as the English Parliament is concerned, it is difficult, on this evidence, not to conclude that there has been general satisfaction with the scope of the "treasons" embraced within the three classic branches of the Statute. Compare the judgment reached by Stephen, after an exhaustive consideration of the history:

> The general effect of the whole is that the statute which has been so much praised, is really a crude, clumsy performance, which has raised as many questions as it can have settled, and which has been successful only when it was not required to be put in force. It has been praised by one party because it does not, in terms, relate to treasonable conspiracies, and by another because they approved of the artificial constructions of which they said it was capable. The fact that it has been in force for 530 years seems to me to show only the extreme indifference of the public to the manner in which their laws are worded, and the attachment of the legal profession to phrases which have been long in use and to which an artificial meaning has been attached. If, however, we turn from the mode by which the present result has been arrived at, to the result itself, I do not think it can be said to be a bad one, except in so far as the levying of war has been interpreted to extend to great

riots for a political object. The Criminal Code Commission proposed to re-enact the existing law with a few unimportant exceptions * * * [95]

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3. ENGLISH CASE LAW PRIOR TO 1790*

Only 11 reported English cases antedating the adoption of the United States Constitution seem to have involved distinct charges of adherence to the king's enemies. One of these arose in 1554 during the reign of Mary, as the result of Wyat's rebellion, and another in 1746 during the reign of George II, as the result of the Scotch uprising in aid of the Young Pretender. The others all arose out of war with France: one in 1691 during the reign of William and Mary; four in 1696 during the reign of William III; one in 1708 during the reign of Anne; one in 1758 during the reign of George II; and one in each of the years 1781 and 1782, during the reign of George III. These cases are here examined to ascertain the concepts employed by the English judges in dealing with the crime of adherence, especially in comparison with the doctrines developed in the English cases prior to 1787 under the heads of compassing the death of the king, and levying war upon him.

Trial of Sir Nicholas Throckmorton, 1 How. St. Tr. 869 (1 Mary, 1554.) Throckmorton was indicted under all three principal branches of the

[95] 2 Stephen 283.

*The materials under this heading were collected and prepared in the first instance by attorneys on the staff of the Department of Justice, and revised and edited by Mr. Hurst. In the preparation of this section every reported English treason case of any conceivable consequence antedating 1790 was examined.

Statute of Edward III. Evidence was introduced at the trial to show that he had "incited" and "procured" the rebellion of Thomas Wyat, who had shortly before confessed his guilt in levying war against the queen, in circumstances which would today probably be regarded as amounting to civil war. [Arraignment of Thomas Wyat, 1 How. St. Tr. 861 (1 Mary, 1554)]. The charge to the jury seems merely to have summarized the evidence and to have put to them the naked issue, whether Throckmorton was "guilty of these Treasons, or any of them." (1 *id.* 897). The jury acquitted. Throckmorton was held to answer further charges, and the jury were heavily fined. (1 *id.* 899-902).

The colloquies during the trial may evidence acceptance of the idea that consultation with the enemy, or inciting him to action, might constitute adherence. (1 *id.* 891 *et seq.*). The authority of the case, as a definition of treason under the Statute of Edward III, is impaired, however, by the intimation of Lord Chief Justice Bromley, that the court may not, at this time, have regarded itself as limited to such doctrine as could be fitted within "the express words of the statute".[96]

[96] To Throckmorton's plea for sticking to the letter of the statute Lord Chief Justice Bromley replied (1 How. St. Tr. 891)—

> Notwithstanding the principle, as you alledge it, and the preciseness of your sticking to the bare words of the Statute, it doth appear and remain of record in our learning, that divers cases have been adjudged Treason, without the express words of the statute, as the queen's learned counsel there can declare.

Moreover; the comments of the judges during the trial, and their action in fining the jury, evidence the fact that the court viewed the case with strong feeling and with an eye to the policy of curbing the public unrest over the Spanish alliance, which defendant had opposed.

Trial of Sir Richard Grahme (*"Lord Preston's Case"*), 12 *id.* 645 (2 Wm. & Mary, 1691). (See I Br., pp. 42–48). Lord Preston and two others were indicted on the charges of compassing and adherence, both laid in the county of Middlesex. It appeared at the separate trial of Lord Preston that he had taken a small boat at Surrey Stairs in the county of Middlesex; had boarded a ship in the county of Surrey; and had been discovered under the hatch of the ship by the arresting officers, while in the county of Kent, together with Ashton, who carried concealed in his clothing a sealed packet which the prosecution sought to prove to have contained documents setting forth a treasonable plan. (12 *id.* 729–732, 740). In a colloquy between Lord Chief Justice Holt and the prisoner, the former declared that taking boat in Middlesex, to board a ship in prosecution of an intention to carry the papers to France, constituted "an overt act in the county of Middlesex", and that whether the papers were the prisoner's, and whether he meant to go to France, were questions for the jury. (12 *id.* 726–727, 727–729; I Br., pp. 43–46). Lord Chief Justice Pollexfen and the Lord Chief Baron in substance supported

Holt's concept of the overt act." L. C. J. Holt charged the jury. He told them that Lord Preston stood indicted for high treason in imagining and compassing the death of the king and queen, and that he was charged in that connection with writing a plan for the invasion of England and "designing" to carry the plan to France. The Lord Chief Justice then observed (12 *id.* 730),

> There is another treason in the indictment mentioned, and that is for adhering to, and abetting the king's enemies, there being open war declared between the king and queen, and the French king.

He made no further direct comment on the charge of adherence, however, but went on (12 *id.* 734) to

[97] Lord Chief Justice Pollexfen's statements are set forth at 1 Br., pp. 45–46 and 12 How. St. Tr. 728–729. The Lord Chief Baron said (12 How. St. Tr. 729–730)—

> Your lordship makes a question: as the proof stands, whether here be any thing done within this country? Here are instructions given to the French king how to invade England, and carry on the war against us. These instructions are contained in several papers, and these papers in a packet are carried to the smack, which smack was hired to go to France. You are found taking water at Surrey stairs, which is in the county of Middlesex, in order to go to the smack: you did go to the smack: the papers were taken in your company, and were seen lying by your seals; and the witnesses swear, they believe some of them to be your hand; you took care to desire to have them disposed of. Now how far the jury will believe this matter of fact, that is thus testified, is left to them; this seems to be the proof, and if the jury do believe it, here is a plain evidence of an overt-act in the county of Middlesex.

sum up the evidence, which, if believed, he felt clearly showed treason:

> Gentlemen, there is no manner of doubt but this is a treasonable declaration, and if any person had this in his possession, and was going into France to carry, with an intention there to make use of it, that is treason, though it be couched under specious pretences of restoring people to their liberty: it was plainly a design to invade England by a French army.

In concluding his charge, Holt again clearly sustained the sufficiency of the overt act charged in Middlesex (12 *id.* 740):

> Ay, but gentlemen, give me leave to tell you, if you are satisfied upon this evidence that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen, and make use of the papers to that end, then every step he took in order to it, is high-treason, wherever he went; his taking water at Surrey stairs in the county of Middlesex, will be as much high-treason, as the going a ship-board in Surrey, or being found on ship-board in Kent, where the papers were taken.

The jury convicted Lord Preston, but the latter obtained a pardon less than ten days thereafter. (12 *id.* 745, 817). Ashton was next tried, under the same indictment; was convicted; and was executed. There is no record that the third person indicted was ever brought to trial. (12 *id.* 747). Ashton's case does not require separate statement, as its significance may be sufficiently seen in a discussion of Lord Preston's conviction.

The circumstances of this prosecution, like those of Throckmorton's, suggest that the breadth of doctrine laid down may have reflected something more than a purely professional development of the law. This case was tried in what was only the second year of the reign of William and Mary, with the long vexing problem of the Pretender freshly created and pregnant with peril to the new government created by the Glorious Revolution. Lord Preston seems to have met with serious disfavor in the new regime.[22] The trial proceeded with marked expedition. The indictment was returned January 15, 1691; the trial began the morning of the next day; and on the 17th of January the selection of the jury was begun. The prisoner was denied counsel on the ground that even the technical question of the overt act laid in Middlesex did not constitute a question of law, but was a "matter of fact only" (12 *id.* 728). Although the report of the trial contains about 50,000 words, the trial was completed and the jury had returned its verdict in time for the court to adjourn until Monday, January 19. (12 *id.* 747). Some of the statements of the judges indicate definite hostility to the defendant, notably the declaration of Lord Chief Justice Pollexfen (12 *id.* 741), opening his address to the jury, that

[22] Preston, reported elsewhere (27 How. St. Tr. 24) to have served as secretary of state to King James II, protested at his trial that he had intended to go to Flanders to secure rest and quiet, after having suffered the loss of his places in the revolution, and after having been twice imprisoned in the Tower and proclaimed a traitor throughout the country without having been indicted. (12 How. St. Tr. 743.)

> I am fully of opinion there never was a more black not horrible treason than is this plot that is now discovered; for I think Englishmen have no greater enemies than the French and the Papists.

It may be doubted whether this hostile atmosphere was overcome by the efforts of Lord Chief Justice Holt to introduce an element of greater moderation by his remarks, just before the jury retired (12 *id.* 744):

> You are a stranger to most of us, and I am sure we do not desire your life; but still we must take care that justice be done to the government and the kingdom, as well as to any particular person; and evidence that is given must have its due weight and consideration: If any one can design innocently to go into France, at this time of day, with such papers, and in such a manner, that I leave to the jury's consideration.

In view of the speed of the trial, and the "convicting" atmosphere surrounding it, it seems likely that the court and jury in substance paid little attention to technical difficulties regarding the pleading and proof of the overt act, and in effect treated the whole course of the prisoner's conduct as the overt act. At least, it is suggestive that in the later trial of Ashton (who, likewise denied counsel, seems to have been less capable of astute self-defense than Lord Preston), the issue of showing an overt act specifically in Middlesex was not raised, and the case was put to the jury by Lord Chief Justices Holt and Pollexfen on all the evidence. (12 *id.* 803 *et seq.*). Perhaps it was on this account that the charges to the jury in Ash-

ton's case embraced only the accusation of compassing. Cf. *Trial of Sir Henry Vane,* 6 How. St. Tr. 119, 123–129 (14 Charles II, 1662). But cf. *Trial of Captain Thomas Vaughn,* 13 How. St. Tr. 485, 535 (8 William III, 1696).

These circumstances apart, a question may be raised concerning the relevance of the overt act ruling in *Lord Preston's Case* to the definition of "treason" under the United States Constitution. For the judges in *Lord Preston's Case* seem to have had no intention of suggesting, or any consciousness that there might be a need to suggest, a difference of scope between the charges of compassing and of adherence. The charge of compassing is clearly to the fore in the court's attention, and though it does not appear that the court would regard the adherence charge as involving any narrower doctrine under English law, there may be a question whether the latter charge should be read so broadly under the American definition, which excludes any branch of treason analogous to compassing the king's death.

Three cases tried five years after Lord Preston's case involved indictments for adhering to enemies as well as for compassing the king's death: *Trial of Sir John Freind,* 13 How. St. Tr. 1, 4, 11 (8 Wm. III, 1696); *Trial of Sir William Parkyns,* 13 *id.* 63, 67 (8 Wm. III, 1696); *Trial of Peter Cook,* 13 *id.* 311, 346 (8 Wm. III, 1696). France and England were then at war. In each case the government introduced evidence to show the defendant's complicity in a plot to have the French send forces to England, to establish James II as King of England. Lord Chief Justice Holt presided in the cases of *Freind*

and *Parkyns;* and in each he placed his charge solely on the allegation of compassing the king's death. Lord Chief Justice Treby presided in the *Cook* case, and charged the jury in terms which leave uncertain whether in his view a conspiracy is a sufficient overt act to make out the treason of adherence to enemies (13 *id.* 311, 386):

> there are laid in the indictment two sorts of treason; the one is compassing and imagining the death of the king, the other is adhering to the king's enemies. The evidence to prove these treasons seems to be joint; for, as to that of compassing and imagining the king's death, as well as to the other, the overt acts are meeting and consulting about the treason, and then agreeing and resolving to invite and procure an invasion from France, and to meet that invasion with an insurrection here. And the evidence is applied equally to prove these acts.
>
> Gentlemen, that these are proper overt-acts of compassing the king's death, I need not inform you, the law is very well known; and the prisoner's own counsel do acknowledge, that these are sufficient overt acts of compassing and imagining the king's death: so that all which they defend him by is, the improbability of the testimony given against him.

Since the judges thus chose to ignore the question whether a conspiracy which would suffice as an overt act of compassing would likewise serve to make out a charge of adherence, there seems some room for an inference that compassing and adhering doctrine may diverge, at least to the extent that conspiracy may not make out a charge of

adhering any more than of levying war.[99] Though this may suggest that the crimes of adherence to enemies and levying war are of narrower scope than that of compassing the death of the king, it also may indicate that the difference is not so much in the proof of treasonable intent, as in a requirement that in the first two an act must be shown which is closer to the point of execution of the intent than under a charge of compassing.

Analysis of the elements of "treason" is hammered out further in lengthy colloquies between court and counsel in *The Trial of Captain Vaughn*, 13 How. St. Tr. 485 (8 Wm. III, 1696), held about six months after the trials of Freind, Parkyns, and Cook. Captain Vaughn was charged with levying war and adhering to the king's enemies; but, as Lord Chief Justice Holt observed, "the adhering to the king's enemies is principally insisted on."[100] In substance, the overt act of adherence charged was that of cruising in a small ship of war, in English waters, in the service of France, with intent to take the king's ships while France and England were at war. The effort of the Crown to introduce evidence of an overt act different from that set out in the indictment provoked a discussion which yields some clarification of analysis of the nature of the overt act required under the three major branches of the crime. Interpreting the recent statute forbidding the showing of any overt act as such other than that laid

[99] Lord Chief Justice Holt distinctly ruled in the *Freind* case itself that a conspiracy to levy war would not constitute the treason of levying war. See footnote 126, *infra*.

[100] 13 How. St. Tr. 532.

in the indictment (7 Wm. III, c. 3, VIII), the court seems at first inclined to believe that the levying of war or adhering to enemies were charges intrinsically so definite in outline that no further specification need be made in the indictment; and that, the general charge of levying or adhering having been made, any particular act amounting to levying or adhering could then be shown. The charge of compassing, on the other hand, was seen as involving "not an overt act in itself, but * * * a secret imagination in the mind",[101] and that hence the mere charge of compassing would not sufficiently indicate the grávamen of so broad and hidden an accusation, so that a particular overt act must be specified, and the proof must then, under the statute, conform to that specification. If this was in fact the court's first inclination, further argument altered it, and the court ruled that the indictment must spell out the particular act of adherence relied on by the prosecution, and that the proof must conform to the particular charge so laid.[102] Though the analysis is not wholly clear, it seems apparent that the judges were brought to see that "adhering" to an enemy was not in its nature a single act of clearcut character, but more likely a general enterprise, likely to have many particular acts as components. Thus at one point, Lord Chief Justice Holt pointed out that no further specification of an overt act than an accusation in the very terms of the Statute of Edward III could well be required where the charge was the killing of the

[101] 13 How. St. Tr. 496.

[102] 13 How. St. Tr. 499–500.

chancellor or treasurer.[103] In contrast, he subsequently stated the defense contention, with which he finally agreed, to be that

> * * * it is necessary to alledge in what manner he levied war, or adhered to the king's enemies; as that he appeared in such a warlike manner, or did adhere to and assist the king's enemies, by joining forces with them, or otherwise assisting them, or confederating with them; that, must be specified.[104]

So also this underlying rationale is reflected in the comment of Lord Chief Justice Treby, that although

> * * * the overt act or acts, in this case, [adhering] ought to be the particular actions, means, or manner by which the aid and comfort was given[105]

this could not be required of the charge of treason by violating the queen:

> And yet it is hardly possible to set forth any overt act concerning the second [head of treason under Statute Edward III], otherwise than the words of the statute, that article expressing so particular a fact.[106]

Some of the court's remarks in the course of discussion involve the familiar, and inherently ambiguous, references to an overt act in compassing as necessary to "manifest" the "secret thought and internal purpose"[107] which is the essence of

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[103] 13 How. St. Tr. 496.
[104] 13 How. St. Tr. 496–497.
[105] 13 How. St. Tr. 498.
[106] 13 How. St. Tr. 498.
[107] 13 How. St. Tr. 497–498.

that charge. And when Lord Chief Justice Treby contrasts the other two main branches of the crime, noting that in them "the treason consists in visible or discernible facts, as levying war, &c.",[108] it may seem that he implies that an act of levying war or adhering to enemies will, *ipso facto*, be such as "manifests" the treasonable purpose. But the underlying note remains the realization that all of the major heads of treason involve broad purposes, which may be pursued in many ways; and the fair inference from this appraisal is that one may in fact engage in conduct of varied types in the furtherance of such a purpose, and that the act will hence not necessarily be of such a clearcut character that the policy of the statutory rule for indictments can be satisfied by a charge simply in the terms of the act of Edward III.[109]

Not only does *Vaughn's* case thus imply recognition that acts of ambiguous or indifferent character may amount to overt acts of treason, but in plainer fashion it indicates the judges' belief that an actual giving of aid and comfort is not required to make out a charge of adherence. Defense counsel objected to the sufficiency of the indictment:

> * * * for it is said only he went a-cruising; whereas they ought to have alledged

[108] 13 How. St. Tr. 497–498.

[109] In the *Trial of Daniel Dammaree*, 15 How. St. Tr. 521, 546, note, "it was resolved by all the judges, upon conference, that the indictment was good, and that levying war being an overt act of itself, no other overt act need be alleged. They agreed, however, that it ought to appear sufficiently upon the indictment that a war was levied, and that they appeared in such warlike manner; and that an indictment generally that A. levied war is not good."

> that he did commit some acts of hostility, and attempted to take some of the king's ships; for cruising alone cannot be an overt-act; for he might be cruising to secure the French merchant-ships from being taken, or for many other purposes, which will not be an overt-act of treason.[110]

Lord Chief Justice Holt replied—

> I beg your pardon. Suppose the French king, with forces, should come to Dunkirk with a design to invade England; if any one should send him victuals, or give him intelligence, or by any other way contribute to their assistance, it would be high-treason in adhering to the king's enemies.

Mr. Phipps answered that "here is nothing mentioned but cruising." Lord Chief Justice Holt tersely replied—

> Cruising about the coasts of England with a design to destroy the king's ships.[111]

And he expounded further the preventive policy which he evidently felt to be the sound basis of doctrine here:

> When men form themselves into a body, and march rank and file with weapons offensive and defensive, this is levying of war with open force, if the design be public. Do you think when a ship is armed with guns, &c. doth appear on the coast, watching an opportunity to burn the king's ships in the harbour; and their design be known, and one goes to them, and aids and assists them, that this is not an adhering to the king's enemies?[112]

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[110] 13 How. St. Tr. 531.
[111] 13 How. St. Tr. 532.
[112] 13 How. St. Tr. 532.

Lord Chief Justice Treby spells out the doctrine in greater detail:

> The indictment is laid for adhering to, and comforting and aiding the king's enemies. You would take that to be capable to be construed adhering to the king's enemies in other respects; but I take it to be a reasonable construction of the indictment, to be adhering to the king's enemies in their enmity. What is the duty of every subject? It is to fight with, subdue, and weaken the king's enemies: and contrary to this, if he confederate with, and strengthen the king's enemies, he expressly contradicts this duty of his allegiance, and is guilty of this treason of adhering to them. But then you say here is no aiding unless there were something done, some act of hostility. Now here is going aboard with an intention to do such acts; and is not that comforting and aiding? Certainly it is. Is not the French king comforted and aided, when he has got so many English subjects to go a cruising upon our ships? Suppose they man his whole fleet, or a considerable part of it; is not that aiding? If they go and enter themselves into a regiment, list themselves and march, though they do not come to a battle, this is helping and encouraging; such things give the enemy heart and courage to go on with the war; or else it may be, the French king would come to good terms of peace. It is certainly aiding and comforting of them to go and accept a commission, and enter into their ships of war, and list themselves, and go out in order to destroy their fellow subjects, and ruin the king's ships; these are actings of an hostile nature. And if this be not adhering, &c. it may as well be said, that if the same persons had made an attack

> upon our ships, and miscarried in it, that had not been so neither; because that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy. And after this kind of reasoning they will not be guilty, till they have success; and if they have success enough, it will be too late to question them.[113]

Lord Chief Justice Treby's analysis clarifies the problem in several basic respects. His last comment points to the fact that "treason" must be viewed as a crime inherently of the nature of an attempt, because the threat underlying a treasonable intent is the most fundamental that can be raised; to rule that only accomplished aid and comfort will sustain the charge is to risk stultifying one's self, for if aid and comfort is accomplished, there may no longer be a sovereign to prosecute the offense against the allegiance owed him. His ready rejection of the notion "that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy" suggests an understanding that warfare is largely a matter of chance, as well as of the ultimate accounting of many factors of accretion on one side and attrition on the other. Thus, although any particular effort may fail, the very contribution of effort increases to that extent the enemy's chances of success, and aid and comfort is thus given. This implication is linked, also, with the recognition that aid and comfort need not be merely material, but may consist to a significant degree in giving heart to the enemy and bolstering morale by the encouragement given by the tender of help.

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[113] 13 How. St. Tr. 532–533.

The next case in this line is that of *William Gregg*, 14 How. St. Tr. 1371 (6 Anne, 1708). Gregg pleaded guilty to an indictment for compassing and adhering after being apprehended as the result of the discovery by the postmaster at Brussels of a correspondence between the office where Gregg worked and the French, with whom the English were at war. According to the report of Judge Foster (14 How. St. Tr. 1376), the sending of letters of intelligence to the enemy was resolved by all the judges to be an overt act of both adhering and compassing. See also, 19 How. St. Tr. 1344. Here again, we have a decision to the effect that action taken to increase the chances of the enemy constitutes an overt act of adhering to the enemy, giving them aid and comfort, although it actually was prevented from being successful for its particular purpose.

The *Trial of James Bradshaw*, 18 How. St. Tr. 415 (20 Geo. II, 1746), involved charges of compassing, levying, and adherence growing out of the defendant's participation in the Scottish uprising designed to install the Young Pretender as king of England. Although the participants were called rebels, their activity seems to have amounted to war. The report of the case is scanty and contains neither discussion of the adherence charge nor the instructions by the court to the jury.

The indictment in the *Trial of Dr. Hensey*, 19 How. St. Tr. 1341 (32 Geo. II, 1758) was for compassing and adhering. Hensey was charged with committing treason in Middlesex by sending letters of intelligence to be delivered beyond the seas to the French, then at war with the English. (14 How. St. Tr. 1376–1377, footnote). It was

proven by persons who knew Hensey's handwriting that intercepted letters had been written by him. One of the letters was dated at Twickenham, which was in Middlesex. The defendant contended that no one act was proved against him in Middlesex, and that the evidence, even if it "had been brought home * * * so as to affect him, yet by no means would have amounted to a proof of any overt-acts of either of the two before named species of treason" (19 How. St. Tr. 1343).

According to the report which Howell takes as authoritative, Lord Mansfield charged the jury that (19 How. St. Tr. 1344)—

> As to the law—levying war is an overt-act of compassing the death of the king: an overt-act of the intention of levying war, or of bringing war upon the kingdom, is settled to be an overt-act of compassing the king's death. Soliciting a foreign prince, even in amity with this crown, to invade the realm, is such an overt-act; and so was cardinal Pool's case. And one of these letters is such a solicitation of a foreign prince to invade the realm.
>
> Letters of advice and correspondence, and intelligence to the enemy, to enable them to annoy us or defend ourselves, written and sent, in order to be delivered to the enemy, are, though intercepted, overt-acts of both these species of treason that have been mentioned. And this was determined by all the judges of England, in Gregg's case: where the indictment (which I have seen) is much like the present indictment. The only doubt there, arose from the letters of intelligence being intercepted

and never delivered: but they held "that that circumstance did not alter the case."[114]

The significance of the case, as with *Lord Preston's* case, may, however, be cast somewhat into question, by the fact that after being convicted the defendant received a pardon. (19 How. St. Tr. 1382.)

The last cases antedating the adoption of the Constitution known to involve charges of adherence to the enemy are the *Trial of Francis De la*

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[114] From another report of the trial, considered by the reporter in Howell's State Reports "to be very inaccurate" (19 How. St. Tr. 1348, footnote), but nevertheless set out by him, it appears that Mansfield said in his charge to the jury (19 How. St. Tr. 1373–1374)—

> That which constitutes an overt-act in the eye of the law, is the accomplishment of the end proposed by the party acting to the best and utmost of his power. If a man endeavors to do an act of treason, and that act of treason fails through some intervening accident or occurrence, the party so endeavoring and acting to the best of his ability and power is deemed to be guilty of an overt-act, as though he had done the thing he had proposed and intended. Thus, in cases of murder as well as treason, suppose a man firing off a gun, or a pistol, with a premeditated design to kill another, and by some accident or event, either the gun or pistol do not go off, or the party shot at evades the blow, the party shooting is guilty of an overt-act, and is liable to be indicted as guilty of a capital offense.
>
> * * * * * * *
>
> As to my own part, the letters under consideration appear to me, to be absolute overt-acts, as real overt-acts as can possibly be: but whether the jury shall think so, is to be left to their consideration, who are indeed the best and proper judges.

Motte, 21 How. St. Tr. 687 (21 Geo. III, 1781), and the *Trial of David Tyrie*, 21 How. St. Tr. 815 (22 Geo. III, 1782).

The report of the *De la Motte* case sets out the indictment in full. The same overt acts were alleged under a compassing count and under an adhering count. They included writing and causing to be written documents conveying intelligence to the French, with whom the English were again at war; writing and causing such documents to be written, "to be sent" to the French; and actually sending or causing them to be sent "from the parish aforesaid, in the county of Middlesex aforesaid, to be delivered, in parts beyond the seas." Other overt acts included procuring one Ratcliffe, within the county, to carry documents conveying intelligence from England to France; taking papers to the defendant's house to be sent to the French; and hiring one Lutterloh to gather and send intelligence to them. (21 How. St. Tr. 698-704.) Here we have alleged as overt acts of adherence about every conceivable step in the process of providing intelligence to the enemy falling short of actually transmitting it into the enemy's hands.

It appeared at the trial that the defendant had hired Ratcliffe to carry parcels to France from England, and that parcels were accordingly carried which contained letters the contents of which were not proven. The defendant was arrested upon coming into his house in Middlesex, and attempted to conceal papers in his pockets from the arresting officers. There was also evidence that the defendant had hired Lutterloh to obtain and

send information to the French, and there was testimony that certain letters which had been stopped at the post office were in the defendant's handwriting.

The defendant contested the proof of his handwriting, denied hiring Lutterloh to get or send intelligence, and claimed that the finding of papers in the defendant's possession when he was apprehended was the result of a trap set by Lutterloh to catch an innocent man. He contended that it had not been proven that Ratcliffe had been hired to carry documents, and claimed that no document proved against him could have given intelligence to the enemy. Some of the documents appear to have been quite innocent on their face.

Mr. Justice Buller, in his charge to the jury, adverted to the treasons of compassing and of adhering and then said (21 *id.*, 808)—

> The compassing the death of the king is the act of treason; and the overt acts which are laid in the indictment (the evidence of which I shall state to you presently) are only the means which are made use of to effectuate the intentions and the imaginations of the heart. In this way the crime of treason has been defined by our ancestors, and has been settled for ages past. The overt acts, of which the evidence has been given to you, consist of collecting intelligence for the purpose of supplying the enemy with it, of sending intelligence to the enemy, and of hiring persons for the purpose of collecting that intelligence in this kingdom. The sending of intelligence, or collecting intelligence, for the purpose of sending it to an enemy, to enable them to annoy us or to defend themselves, though it be never delivered to the

> enemy; or the hiring of a person for that purpose, is an overt act of both species of treason which I am stating to you from this indictment.

Thus Mr. Justice Buller declared that sending intelligence to the enemy constitutes an overt act of compassing as well as of adhering.[115] Even defense counsel apparently is willing to concede that the significance of the act of sending intelligence does not depend upon its significance as in itself showing the existence of a treasonable intent, so far as the crime of adherence is concerned.[116]

Mr. Justice Buller does not seem to extend the crime of adherence beyond cases of giving aid and comfort to the enemy, in the sense of at least doing what increases the enemy's chances. He goes so far as to suggest that the collecting of information with the intention of sending it to the enemy constitutes an overt act of adherence as well as of compassing.

The *Trial of David Tyrie, supra,* the last case in this series, also involved an indictment charging compassing and adhering growing out of the interception of letters claimed by the prosecution to have been letters of intelligence, but which the defendant claimed to have been directed merely to a smuggling enterprise.

All but one of these eleven cases involving charges of adherence to the enemy also involved a compassing charge. While the cases abun-

[115] This accords with the arguments of the Attorney General and Solicitor General, 21 *id.* 721, 797.

[116] 21 *id.* 772.

dantly illustrate the defects for analytical purposes of a system of swift justice operating without benefit of appellate review, they do offer the beginning outlines of the treason of adhering. There seems to be a perceptible trace of a tendency to expand its scope by techniques similar to those employed with respect to the charge of compassing the death of the king. The cases do show a keen realization of the realities of warfare and the dangers to be apprehended from the enemy. There is a willingness in some respects to accept as evidence that which would very probably be regarded as insufficient evidence of an overt act of treason today. This appears most sharply in the cases holding that the interception of letters at the post office, and testimony of witnesses predicated on their professed familiarity with the defendant's handwriting that such letters had been written by the defendant, constitute proof that he had written and dispatched the letters, in the absence of any direct evidence to that effect. But this aspect of such cases does not affect the policy underlying their indication of the relation of the act and intent elements of the crime and the extent to which aid and comfort must be conferred.

In contrast to the law with respect to the treason of adhering, the law with respect to the treasons of compassing and levying war was well developed in England before the adoption of the United States Constitution. These latter branches of treason present important analogies and historical problems which must be considered if the handful of adhering cases is to be placed in their proper setting.

According to Mr. Luder's translation of the statute of 25 Edw. 3 (set forth, along with the original French and an earlier English translation, in a footnote at 5 How. St. Tr. 971–977), it declared treason to exist—

> In case where a man doth compass or imagine the death of our Lord the King, the Lady his Consort, or of their eldest son and heir; or if a man violate the King's Consort, or the King's eldest daughter being unmarried, or the consort of the King's eldest son and heir. And if a man levy war against our said Lord the King in his realm, or be adherent to the enemies of our Lord the King in the realm, giving to them aid and support in his realm or elsewhere; and thereof be attainted upon due proof of open deed by people of their condition.

On its face the statute would seem to make no requirement for commission of the treason of compassing the king's death beyond entertaining the proscribed mental state.[117] Indeed, the view apparently obtained at an early date that there could be conviction for entertaining the mental intention without more.[118] It was soon recognized, however, that there could be no conviction if the mental state were not translated into action in some manner, and there are numerous statements in the cases such as the following by Attorney General Coke in the trial for the Gunpowder Plot, 2 How. St. Tr. 159, 167 (3 James I, 1606).

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[117] But see Lord Chief Justice Treby in the *Trial of Captain Vaughn*, *supra*, pp. 497–498.

[118] Y. B. 19 Hy. VI Mich. pl. 103, set forth in Holdsworth, History of English Law (3d ed.) p. 292, n. 7.

> For treason is like a tree whose root is full of poison, and lieth secret and hid within the earth, resembling the imagination of the heart of man, which is so secret as God only knoweth it. Now the wisdom of the law provideth for the blasting and nipping, both of the leaves, blossoms, and buds which proceed from this root of Treason; either by words, which are like to leaves, or by some overt act, which may be resembled to buds or blossoms, before it cometh to such fruit and ripeness, as would bring utter destruction and desolation upon the whole state.

The requirement of two witnesses was not embodied in the statute of 25 Edward III, but "rested upon a strained construction of the combined effects of statutes of Edward VI's and Mary's reign." [119] In the absence of that requirement, proof of the treason of compassing apparently could take a wide range. Thus, in the *Trial of Edward Abington,* 1 How. St. Tr. 1141 (14 Elizabeth, 1571), the defendant contended that statements of condemned persons could not be used to prove the crime of compassing. The following colloquy between Lord Chief Justice of the Common Pleas Anderson, Tilney, one of the accused, and the Solicitor, then followed:

> ANDERSON. For answer to you, Abington, for the point of the statute, true it is, had you been indicted on the Statute of the 1st and 13th of this queen, two Witnesses ought to have been produced; but you stand indicted by the common law, and the Statute of 25 Edw. 3, which is, who shall intend the

[119] 9 Holdsworth, p. 207.

death of the king, &c. and in that statute is not contained any such proof.

TILNEY. The statute of 25 Edw. 3 is, who shall compass or imagine, &c.

ANDERSON. Very well, and not contained to prove by witnesses, as you would have it.

SOLICITOR. See how they would acquit themselves for want of Witnesses; and if it should be as they would have it, then could never any Treason be sufficiently proved. The statute of 1 Eliz. is so, the Overt-Act must be proved by two Witnesses; but the statute of 25 Edw. 3 is, Who shall imagine: how then can that be proved by honest men, being a secret cogitation which lieth in the minds of traitors? And such traitors will never reveal their cogitations unto honest men, but unto such as themselves, and they I hope be no honest men; so then they would have their treasons never revealed.[126]

* * * * *

The requirement of two witnesses in no way altered the early conception of the crime as consisting of the proscribed mental state, as will be seen from the following *Resolutions of the Judges upon the Case of the Regicides*, 5 How. St. Tr. 947, 972–974 (12 Charles II, 1660)—

4. It was resolved, that the indictments should be, for compassing the death of the late king, (the very compassing and imagining of the king's death, being the treason within the statute of 25 Edw. 3,) and then that we might lay as many overt-acts as we would, to prove the compassing of his death. But it was agreed, that the actual murder of the king should be precisely laid in the

[126] How. St. Tr.

indictment, with the special circumstances as it was done; and should be made use of as one of the overt-acts, to prove the compassing of his death.

5. It was resolved, that if any one overt-act tending to the compassing the king's death, be laid in the indictment, that then any other act, which tends to the compassing of the king's death, may be given in evidence, together with that which is laid in the indictment.

As Holdsworth and Stephen have observed,[121] the statute of 25 Edw. III was insufficient to cope with attempts to subvert the government if construed literally, for it made no express provision against conspiracies to depose, imprison or coerce the king, or against conspiracies to create internal disorder.

In course of time, the treason of compassing was held to embrace all these matters by holding that a participant therein must have intended the death of the king.[122] Doubtless this declaration was often quite true as a matter of fact. "* * * as history and experience show, to dethrone the king leads to his death; so a conspiring or design to imprison the king. The distance between the prison of a king and his grave is small indeed." Statement of the Attorney General in *Trial of William Jackson*, 25 How. St. Tr. 783, 806 (34 & 35 Geo. III, 1794, 1795).

Many of the treason trials had backgrounds of serious disaffection of large segments of the people, often extending to violent physical opposition to the national government. Loyalty of the vast

[121] 4 Holdsworth, p. 496.

[122] *Trial of the Duke of Norfolk*, 1 How. St. Tr. 957 (44 Eliz., 1571); *Trial of the Earls of Essex and Southampton*,

preponderance of the population to the national government could by no means be assumed as it is today, and the forces of the national government were characteristically weak. These factors, and a relatively lower level of human sensibilities, are reflected in long-continued lack of procedural

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1 How. St. Tr. 1333 (43 Eliz., 1600); *Trial of Sir Christopher Blunt*, 1 How. St. Tr. 1409 (43 Eliz., 1600); *Trials of the Regicides*, 5 How. St. Tr. 947, 1033 (12 Charles II., 1660); *Trial of William Lord Russel*, 9 How. St. Tr. 577, 636 (35 Charles II, 1683); *Trial of Francis Francia*, 15 How. St. Tr. 897, 991 (3 Geo. I, 1717).

The *Duke of Norfolk's Case*, *supra*, involved acts of adhering to the enemy employed as overt acts of compassing. This case and others, particularly *Story's Case*, 3 Dyer 298b (13 Eliz., 1570), are frequently loosely cited as arising under the adhering branch of the statute of Edward III. Cf. *Patrick Harding's Case*, 2 Vent. 345 (2 Wm. & Mary, 1691).

The simplicity of the process of creating treasons of constructive compassing is illustrated by the following statement by Attorney General Sir Edward Coke in the *Trial of the Earls of Essex and Southampton*, *supra*, (p. 1337)—

> * * * the thought of Treason to the prince, by the law is death; and he that is guilty of Rebellion, is guilty of an intent (by the laws of the land) to seek the destruction of the prince, and so adjudged Treason * * *

Compare the following colloquy between Lord Chief Justice Popham and the Queen's Counsel in the *Trial of Sir Christopher Blunt*, *supra*, (p. 1410)—

> L. C. J. Wherever the subject rebelleth, or riseth in a forcible manner to over-rule the royal will and power of the king, the wisdom and foresight of the laws of this land maketh this construction of his actions, that he intendeth to deprive the king both of crown and life;

safeguards for defendants,[123] and in punishments which would be thought barbarous today.[124] The same factors are no doubt reflected to some extent in the broad applications of the treason of

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for the law judgeth not of the fact by the intent, but of the intent by the fact.

Queen's Counsel. This construction is no mystery or quiddity of law, but an infallible conclusion warranted by reason and experience: for the crown is not a garland, or mere outward ornament, but consists of pre-eminence and power; and therefore when the subject will take upon him to give law to the king, and to make the sovereign the commanding power become subject and commanded, such subject layeth hold of the crown, and taketh the sword out of the king's hand. The crown is so fastened upon the king's head, that it cannot be pulled off, but head and life will follow, as all examples at home and abroad do manifest * * *

[123] 9 Holdsworth, pp. 223, *et seq.*

[124] The sentence in the *Parkyns* case (13 How. St. Tr. 136) is typical—

That you, and each of you, go back to the place from whence you came, and from thence be drawn on a hurdle to the place of execution, where you shall be severally hanged up by the neck, and cut down alive; your bodies shall be ripped open, your privy members cut off, your bowels taken out and burnt before your faces; your heads shall be severed from your bodies, your bodies respectively to be divided into four quarters, and your heads and quarters are to be at the disposal of the king: and the Lord have mercy upon your souls.

The king frequently disposed of the parts of the body by having the head put up on London Bridge, and one quarter placed at each gate of the city. Thomas More's sentence was remitted by the king to simple beheading, but nevertheless his head was placed on London Bridge for several months. As it was "about to be thrown into

compassing.[125] Here again the compassing branch was brought to bear on the ground that the particular conduct manifested or proved that the defendant had compassed or imagined the death of the king.

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the Thames to make room for others, his daughter Margaret bought it." (1 How. St. Tr. 396.)

Considerable ingenuity was exercised in earlier times. The Duke of Clarence was done to death by "thrusting his head into a butt of Malmesey." (1 How. St. Tr. 275.) And the killing of the deposed Edward II was a masterpiece of a sort. (1 How. St. Tr. 50.)

[125] See, e. g., *Case of Edward Peacham*, 2 How. St. Tr. 869 (12 James I, 1615); *Trial of John Twyn*, 6 How. St. Tr. 513 (15 Charles II, 1663); *Trial of Algernon Sidney*, 9 How. St. Tr. 817 (35 Charles II, 1683); *Trial of Thomas Rosewell*, 10 How. St. Tr. 147 (36 Charles II, 1684); *Trial of Joseph Hayes*, 10 How. St. Tr. 307 (36 Charles II, 1684); *Trial of Lady Alice Lisle*, 11 How. St. Tr. 297 (1 James II, 1685); *Trial of William Anderton*, 12 How. St. Tr. 1245 (5 Wm. & Mary, 1693); *cf. Proceedings against Duke of Clarence*, 1 How. St. Tr. 275 (18 Edw. IV, 1478); *Trial of Sir William Stanley*, 1 How. St. Tr. 277 (10 Hen. VII, 1494-1495). These cases have been chosen as marking the limits to which the treason of compassing was pushed. In evaluating them, it should be borne in mind that most of them were decided when "prerogative run pretty high." Remarks of Solicitor General on *Sidney's Trial*, 9 How. St. Tr. 999, 1002. It should be noted, however, that although the decision in *Peacham's* case apparently was the result of royal interference his sentence was never executed. *Ibid.* Sidney's attainder was annulled by an Act of Parliament during the reign of William and Mary which declared his conviction unlawful. (9 How. St. Tr. 996.) Rosewell received a Royal pardon. (10 How. St. Tr. 302-303.) Hayes was acquitted by the jury despite a strong charge by Lord Chief Justice Jeffreys. The attainder of Lady Lisle was reversed by an Act of Parliament in the first year of the

The effect of this expansive application of the compassing branch, resulting in the creation of numerous constructive treasons, was to give the charge of compassing a significance beyond that of factual proof of the proscribed state of mind. As an analytical matter, if given conduct were held as a matter of law to prove an intent that it did not prove as a matter of fact, it was really immaterial whether the defendant had entertained that intent. Thus, when conspiracy to imprison the king was held as matter of law to fall within the compassing branch, the real issue would not be whether the defendant had actually compassed or imagined the death of the king, but whether he had engaged in a conspiracy and had entertained the intent to imprison the king.[128] If he had not so engaged, or had not so intended, he would not be guilty of the crime of compassing.

reign of William and Mary. (11 How. St. Tr. 381.) Anderton and Twyn were regularly executed. The Duke of Clarence was secretly put to death. (1 How. St. Tr. 275.) Bacon reports that Stanley's fate was influenced by "the glimmering of a confiscation; for he was the richest subject for value in the kingdom." (1 How. St. Tr. 281.)

[128] Lord Chief Justice Holt stated the matter in typical fashion when he charged the jury in *Friend's* case, *supra* (13 How. St. Tr., p. 61)—

> Then there is another thing that he did insist upon, and that is matter of law. The statute of the 25th Edw. 3, was read, which is the great statute about treasons; and that does contain divers species of treason, and declares what shall be treason. One treason is the compassing and imagining the death of the king; another is the levying of war: Now, says he, here is no war actually levied; and a bare conspiracy or design to levy war does not come within this law against treason. Now for that, I must tell you, if there be only a conspiracy to levy war, it is

In this way a treason which was defined and originally regarded as consisting simply and actually of a particular state of mind was expanded to make treason of conduct carried on with a different state of mind.

Another development of the law of compassing served to give that head significance different from that which it originally had. While in some periods persons apparently were convicted for compassing as the result of "mere" spoken words, it came to be recognized that such words would not suffice.[127] This was apparently the result of an appreciation that talk was cheap and often loose, and that a man ought not be convicted without more reliable proof.[128] *Crohagan's Case*, Cro. Car.

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not treason: but if the design and conspiracy be either to kill the king, or to depose him, or imprison him, or put any force or restraint upon him, and the way and method of effecting these is by levying a war, there the consultation, and the conspiracy to levy a war for that purpose, is high-treason, though no war be levied: For such consultation and conspiracy is an overt-act proving the compassing the death of the king; which is the first treason mentioned in the statute of the 25th of Edw. 3.

[127] *Case of John Owen*, 2 How. St. Tr. 879 (13 James I, 1615); *Case of Hugh Pine*, 3 How. St. Tr. 359 (4 Charles I, 1628); statements of the Attorney General in the *Trial of Thomas Crossfield*, 26 How. St. Tr. 1, 185 (36 Geo. III, 1796); cf. *Case of Williams*, 2 How. St. Tr. 1085 (17 James I, 1619); Charge to the Jury by Lord Chief Justice Jeffreys in *Sidney's* case, *supra* (9 How. St. Tr. 889–890). But cf. *Trial of Thomas Rosewell*, *supra*, note 126.

[128] See Remarks on *Sidney's Trial* by Sir John Hawles, Solicitor General in the Reign of William the Third, 9 How. St. Tr. 999, 1002, 1003; cf. *Charnock's Case*, 2 Salk. 631 (8 Wm. III, 1696.)

332 (10 Charles I, 1634) where an Irish priest in Lisbon declared that he would kill the king if he might come to him, and later did come to England, to be regarded as one where the coming to England constituted the overt act. For example, the Attorney General explained the case in the *Trial of Thomas Hardy*, 24 How. St. Tr. 199, 1085 (35 Geo. III, 1794) as follows:

> Your lordship knows that his making the declaration, though it would be punishable in another way, yet still would not be high treason, if he had not come into England; and upon the whole of the evidence, the coming into England made a part of the transaction with the declaration he had made, it was an overt act of high treason, because it was then understood to be a fact done with the intention which the indictment imputed.[129]

In this way it came to be that spoken words which on their face evidenced the intent did not constitute an overt act of compassing, while other conduct, innocent on its face, did constitute an overt act of compassing if shown by other evidence to have been done with that intent.

In sum, then, there came to be recognized as overt acts of compassing certain conduct carried on with no actual intent, or at least without primary intent, to kill the king, but with an intent to achieve some other end, and conduct seemingly innocent on its face shown by other evidence to have been carried on with a treasonable intent;

[129] But cf. Remarks on *Sidney's Trial* by Sir John Hawles, Solicitor General in the Reign of William the Third, 9 How. St. Tr. 999, 1004.

while on the other hand verbal conduct which on its face did manifest such an intention was not so recognized.

The branch of the statute defining adherence perhaps did not provide as pliant materials for fashioning constructive treasons. Unlike the treason of compassing and like the treason of levying war, the treason of adherence seems defined primarily in terms of conduct. The statute did not stop with the words "be adherent to the enemies of our said Lord the King," but went on to add "giving to them aid and support * * *." The statute appears therefore to deny an opportunity to seize on conduct and declare it to constitute the treason of adherence on the ground that it shows as a matter of fact or law a mental state of attachment to the enemy. On its face, it would seem, more obviously than the compassing provision, to require some quite definite translation of thought into action, as a requisite to the commission of the treason of adherence.

Thus it would seem that the treason of adherence could be given expansive scope only by giving broad meaning to the words "enemies," or "giving aid and support."

The cases of adherence stated above disclose no effort to give expansive application to the term "enemy." The opinion of Coke that adherence to rebels was not adherence to enemies was advanced by counsel for the defendant in *Cook's* case, and met with the apparent acquiescence of the judges. (13 How. St. Tr. 330.) The other cases also quite clearly imply that the treason of adher-

ence could not be committed in the absence of actual war.

The cases on adherence considered above on the whole sustain the proposition that an accomplished fact of aid and comfort in the ordinary sense is not necessary to the crime of treason by adherence. There is sound policy why the crime may be held to have been committed, although in the particular instance the specific aid which the accused intended to give was not in fact conferred, as where a letter containing information of value to the enemy's war effort is intercepted. To an even higher degree than other human enterprises, war is a matter of chance. The greater the number of times that efforts are made to give aid to the enemy, the greater is the probability that on some occasions the specific aid intended will get through. In this sense, the very effort to give aid, by increasing by one the number of chances which the enemy has to receive the kind of assistance intended, in itself constitutes aid to the enemy. Of course not every act, however remote from the possibility of a conferring of aid and comfort, will thus add to the number of "chances" which the enemy enjoys; we are dealing with a practical doctrine in the administration of law. Treason is clearly a crime of the nature of an attempt; and there is no lack of practical experience to show that a workable standard is involved in the concept of conduct which may be said to increase the chance of the occurrence of a result which the law seeks to prevent.

On the other hand, the cases carry some implication that a conspiracy which did not actually reach this stage was insufficient. There is, moreover, no trace of any effort to employ this branch of the statute to deal with domestic disputes on the theory that by causing trouble at home the defendant weakened the country and thereby gave assistance to the enemy.

On the whole the treason of adherence was much more akin to the treason of levying war than to that of compassing. It was perfectly well settled that levying war could not be committed by a mere conspiracy,[130] and it was clearly regarded as requiring commission of the proscribed conduct, rather than the existence of an actual or presumed mental state. While levying war was held to include conduct which we would probably regard as mere riots[131] today, a man could be convicted only if he participated in some way in the actual conduct of levying war as so defined. The treason of adherence was kept distinct, in that giving aid and comfort to rioters guilty of levying was under the broad meaning given that term would not be guilty adhering to the enemy.

Although the gist of the treasons of adherence and levying war was the commission of proscribed conduct in the sense that the necessity of establishing an overt act as a separate element of the offense was there more sharply asserted, intent was of course an element of both in the very real sense that there could be no conviction in its ab-

[130] See footnote 126, *supra;* Paragraph 3 of Resolutions of Judges, reported in 5 How. St. Tr. 984, footnote.

[131] *Trial of Daniel Damaree*, 15 How. St. Tr. 521 (9 Anne, 1710).

sence. Thus, a participant in the conduct was not guilty if his participation was involuntary.[132] On the other hand the overt act was an element of the treason of compassing in the same sense. The difference was that as the latter crime evolved its analysis lacked clarity, since it was habitually stated that the overt act manifested or proved the compassing, while as a matter of fact it might do no such thing if by this was meant that its function was to evidence the intent.

There appears to be no support in the English cases for the notion that an overt act of adherence must not only give aid and comfort to the enemy but also actually be evidence of the treasonable intent. Statements that an overt act must manifest or prove the intent grew out of the original concept of the treason of compassing, and as that concept developed had no real significance in many of the compassing cases themselves. To apply them in any significant sense to the treason of compassing would go in the face of the whole historical development of the English law of treason.

The English cases sustain a literal application of the words of the branch of the statute defining adherence. On the one hand this course requires rejection of a refinement of construction which would mean that the more skilled and less obvious the artifice employed to give aid and comfort to the enemy, the greater the degree of immunity from conviction. On the other hand it confines

[132] Cf. *Trial of Six John Wedderburn*, 18 How. St. Tr. 425 (20 Geo. II, 1746); *Proceedings against John Frith*, 22 How. St. Tr. 307 (30 Geo. III, 1790).

punishment to cases of conduct having an actual tendency to give aid and comfort to the enemy in time of war.

II

TREASON IN AMERICA

1. TREASON DOWN TO THE CONSTITUTION

(a) *Prior to the Revolution*

In most of the colonies there was at some stage some legislative definition or at least recognition of the existence of an offense of treason. Charters and proprietary grants and the royal instructions to colonial governors sometimes conferred authority to exercise martial law for the suppression of what might amount to treason. There were scattered prosecutions for treason in the colonies, but we have few reports of these and no evidence to suggest that there developed a common law of treason or any substantial gloss upon the legislative provisions. However, the statutory offense was generally outlined or recognized in sufficiently general terms to give room for a creative role of the executive in deciding what to prosecute and of the judges in interpreting the scope of the crime.

Taking the colonial period as a whole, in most of the colonies the definition of the offense was clearly thought of in terms of the English legislation stemming from the Statute of 25 Edward III. However, this is not true of the earliest

references to the crime, mainly in the northern colonies. The authority given in charters and grants and in instructions to royal governors is not put in familiar words of art, but merely approves resort to martial law for the suppression of "rebellion", "sedition", or perhaps "mutinies". The North Carolina Charter of 1665 was unusually explicit; but it, like the others, does not use traditional language when it confers power

> to exercise martial law against any mutinous and seditious persons of these parts; such as shall refuse to submit themselves to their government, or shall refuse to serve in the war, or shall fly to the enemy, or forsake their colours or ensigns, or be loiterers, or stragglers, or otherwise offending against law, custom, or military discipline.[5]

The *Laws of New Haven Colony*, as published in London in 1656, contained this provision, which has no resemblance to any familiar English model:

> If any person shall conspire, and attempt any invasion, insurrection, or publick Rebellion against this Jurisdiction, or shall endeavour to surprize, or seize any Plantation, or Town, any Fortification, Platform, or any great Guns, provided for the defence of the Jurisdiction, or any Plantation therein; or shall treacherously and perfidiously attempt the alteration and subversion of the frame of policy, or funda-

[5] Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws (Government Printing Office, Washington, 1909) 2770; cf. 3 *id.* 1833, 1866 (Massachusetts Bay); 5 *id.* 3049, 3056, 3065, 3074 (Pennsylvania).

mentall Government laid, and setled for this Jurisdiction, he or they shall be put to death. *Num.* 16. 2 *Sam.* 18. 2 *Sam.* 20. Or if any person shall consent unto any such mischievous practice, or by the space of foure and twenty houres conceale it, not giving notice thereof to some Magistrate, if there be any Magistrate in the Plantation, or place where he liveth, or if none, to some Deputy for the Jurisdiction, or to the Constable of the place, that the publick safety may be seasonably provided for, he shall be put to death, or severely punished, as the Court of Magistrates weighing all circumstances shall determine.[2]

The biblical citations suggest that this provision was not drawn with any primary attention to following English materials. A much similar provision was contained in the *General Laws* of Connecticut (1673), which under the heading "Capital Laws" declared:

12. If any person shall conspire or attempt any Invasion, Insurrection or publick Rebellion against this Colony, or shall Treacherously and Perfideously attempt the Alteration and Subversion of our Frame of Government Fundamentally established by His Majesties Gracious Charter Granted to this Colony, by endeavouring the betraying of the same into the hands of any forreign power, he shall be put to death.[3]

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[2] Laws of New Haven Colony (London, 1656; edition by State Library, Hartford, 1858) 24.

[3] The Book of the General Laws (Connecticut). (Printed by Samuel Green, Cambridge, 1673, reprinted, Hartford, 1865), p. 9.

The *Laws of the Colony of New Plymouth*, in the revision of 1636, had merely included under "Capitall offences lyable to death",

> Treason or rebellion against the person of the King, State or Commonwealth, either of England or these Colonies.

But the *General Laws and Liberties of New Plimouth Colony, 1671*, in Chapter II, "Capital Laws", expanded the definition in terms like those of the New Haven act:

> 3. Treason against the Person of our Soveraign Lord the King, the State and Common-wealth of England, shall be punished by death.
>
> 4. That whosoever shall Conspire and Attempt any Invasion, Insurrection, or Publick Rebellion against this Jurisdiction, or the Surprizal of any Town, Plantation, Fortification or Ammunition, therein provided for the safety thereof, or shall Treacherously and Perfidiously Attempt and Endeavour the Alteration and Subversion of the Fundamental Frame and Constitutions of this Government; every such Person shall be put to Death.[1]

The last provision was in substance included in *The General Laws and Liberties of Massachusetts Bay* (May, 1678), with about the same biblical citations as in the New Haven provision, and in the *Duke of York's Laws* (1665–1675), compiled from the statutes for the government of the other

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[1] The Compact with the Charter and Laws of the Colony of New Plymouth. Published agreeably to a resolve of the legislature, under the supervision of William Brigham. (Boston, 1836). Pp. 42, 244.

northern English colonies in America by the first English governor, Nicolls, as well as in the criminal code adopted in 1668 by Carteret's Assembly in New Jersey and the *General Laws and Liberties of the Province of New Hampshire*, of 1679.

The bulk of colonial legislation on treason, including the later statutes in the northern colonies, looks to English law for the definition of the offense. Some of these acts adopt the phraseology

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The Charters and General Laws of the Colony and Province of Massachusetts Bay. (Published by order of the General Court.) (Boston, 1814) Ch. XVIII, sec. 12; 1 Colonial Laws of New York (1664–1775) (Published under authority. Albany, 1895) 20; Learning and Spicer, Grants, Concessions and Original Constitutions (1664–1702) of the Province of New Jersey (Philadelphia, 1758) 80; 1 Laws of New Hampshire (Batchellor, ed. Manchester, 1904) 12. The Duke of York's Laws were also applied in the area which became Pennsylvania, before 1682. See George, Nead and McCamant, Charter to William Penn and Laws of the Province of Pennsylvania (Harrisburg, 1879) iv, 15. Compare the terms of the oath included in the instructions from the General Court of New Plymouth Colony to Thomas Prence, commissioned for erecting an orderly government among the inhabitants of the Kennebeck:

> You shalbe true and faithfull to the State of England as it is now established and whereas you choose att present to Reside within the Goverment of New Plymouth you shall not doe or cause to be done any acte or actes directly or indirectly by land or water that shall or may tend to the destruction or overthrow of the whole or parte of this government that shallbee orderly erected or established: but shall contrary wise hinder oppose and descover such entents and purposes as tend thereunto to those that are in place for the time being that the Goverment may be enformed thereof with all convenient speed;

of the Statute of 25 Edward III, with additions inspired by local problems. The earliest indication of this reliance on the Statute of Edward seems to be the text of "An Act for Treasons" which was considered, but not passed, at the session of the Maryland General Assembly in February–March, 1638. Bacon tells us that:

> By this Bill the following Offences were to be adjudged Treasons within this Province,

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Brigham, *op. cit. supra*, note 4, p. 322. Another unconventional early definition of treason was laid down in Act I of the Virginia Grand Assembly, session of October 10, 1649. Reciting that evilly disposed persons were defending the legality of the proceedings against Charles I and declaring that the existing government of the Commonwealth was without legal authority, this act provided that any stranger or inhabiant who should "by reasoning, discourse or argument" defend or maintain the proceedings against the late king, "and being proved by competent witnes, shall be adjudged an accessory *post factum*, to the death of the aforesaid King, and shall be proceeded against for the same, according to the knowne lawes of England," and—apparently adding a different offense of seditious speech—that whoever by irreverent words should go about to blast the memory of the King should suffer such punishment as found suitable by the Governor and Council. Moreover, the Act provided, whoever by words or speeches endeavors to insinuate any doubt regarding the right "of his Majesty that now is" to the colony and all others of his dominions, as King, "such words and speeches shall be adjudged high treason." See 1 Hening, Statutes at Large (New York and Philadelphia, 1823) 359, note. But, "The submission of Virginia to the commonwealth soon afterward (1652) made this drastic law a dead letter * * *" Scott, Criminal Law in Colonial Virginia

viz. To compass or conspire the Death of the King, or the Queen his Wife, or of his Son and Heir; or to levy War against his Majesty, or to counterfeit the King's Great or Privy Seal, or his Coin; or to join or adhere to any foreign Prince or State, being a professed Enemy of his Majesty, in any Practice or Attempt against his said Majesty: Or to compass, conspire, or cause the Death of the Lord Proprietary within this Province, or of his Lieut. General for the Time being, (in Absence of his Lordship,) or to join, adhere or confederate with any *Indians*, or any foreign Prince or Governor to the invading of this Province, or disheriting the Lord Proprietary of his Seignory and Dominion therein. All Offences of Treason to be punished by Drawing, Hanging and Quartering of a Man, and Burning of a Woman; the Offender's Blood to be corrupted, and to forfeit all his Lands, Tenements, Goods, &c. to his Lordship. But Punishment of Death to be inflicted on a Lord of a Manor by Beheading.[6]

(Chicago, 1930) 155. Regarding the similarities in the early legislation of the colonies north of Maryland, see Edsall, ed. Journal of the Courts of Common Right and Chancery of East New Jersey, 1683–1702 (American Legal History Society, Philadelphia, 1937) 113, 116.

[6] Laws of Maryland at Large, by Thomas Bacon, (1637–1754), (Annapolis, 1765), Assembly of February 25–March 19, 1638, No. 22. Bacon notes that at the previous General Assembly of January 25–March 24, 1637, the Freemen, having rejected a Body of Laws drawn in England and transmitted by the Proprietor to be passed in the colony, sub-

Chancellor Kilty notes that:

> In the year 1642, an act was passed [Act of August 1, 1642, July Session, 1642, Ch. 19, renewed until 1645 by Act of September 13, 1642, September Session, 1642, Ch. 45], ordaining punishment for certain greater capital offences, in which were comprised all offences done within the province, which are declared treasons by statute of 25 Edw. 3, Ch. 2, and all offences of conspiring the death or destruction, or of attempting any violence against the person of the lord proprietary, &c. or of holding any private intelligence with a declared enemy of the province, or of rising in arms or mutinying against the lord proprietor, &c. This act was at first of very short duration; but it was re-enacted at another session in the same year, and expired in 1645.
>
> An act was passed in 1649 (Ch. 4.) for the punishment of certain offences against the peace and safety of the province, which related only to mutinous and seditious speeches, practices or attempts, with or without force.
>
> No other act respecting treason was passed in the province, and the necessity of enacting that of 1642, arose probably from the opinion at first entertained, that in criminal cases, the statutes of England did not extend to the province; and to the change of that opinion may be attributed,

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mitted to him a number of bills including Number 36, "A Bill for Treasons." These were never enacted, however, and copies of them have been lost.

the circumstance of no further acts being passed on this subject.

The Connecticut *Acts and Laws* (1702) added to the special provisions already noted in the laws of that colony the more familiar declarations:

> That if any person or persons, shall compass or imagine the Death of our Soveraign Lord the KING, or of our Lady the QUEEN, or of the Heir apparent to the Crown; or if any person shall levy War against our Lord the KING, or be adherent to the Kings Enemies, giving them aid, and comfort in the Realm, or elsewhere, and thereof be probably attainted of open deed by His Peers, upon the Testimony of two Lawful and Credible Witnesses upon Oath, brought before the offender face to face, at the time of his arraignment; or voluntary confession of the party arraigned. Or if any person or persons shall counterfeit the Kings Great Seal, or privy Seal, and thereof be duely convicted, as aforesaid, then every such person and persons, so as aforesaid Offending, shall be deemed, declared, and adjudged, to be Traitors, and shall suffer pains of Death, and also lose and forfeit as in cases of High Treason.
>
> And be it further Enacted by the Authority aforesaid, That the Tryal of all, and every person and persons whatsoever, accused, indicted and prosecuted for High Treason, and misprission of such Treason, shall be

Kilty, A Report of All Such English Statutes, etc. (Annapolis, 1811) 217–220. The Chancellor's remarks are part of a note to his recommendation that the Statute of Edward III be included in the list of English statutes drawn up by him at the request of the legislature, to be declared applicable in the State of Maryland.

> regulated according to Act of Parliament made in the Seventh year of His present Majesties Reign, Entituled, *An Act for Regulating of Tryals in Cases of Treason and Misprission of Treason*; and the party so accused, indicted and prosecuted, to be allowed the benefits and priviledges, in and by the said Act granted and declared.[8]

Similar legislation had been passed in the Massachusetts Bay Colony in 1692 and 1696, and acts of 1706 and 1744 likewise incorporated the procedural guaranties of the statute of 7 William III into more specific legislation directed against "traiterous correspondence with his Majesty's enemies".[9] In New Hampshire, the Act of May

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[8] Acts and Laws (1702) of His Majesties Colony of Connecticut. (Printed by Bartholmew Green and John Allen, Boston, 1702, Reprint, Hartford, 1901) 13–14. This revision, however, also continued the "Capital Laws" provision of 1673 (note 3, *supra*); and both types of treason provision appear in Acts and Laws (1715) (Printed by Timothy Green, New London, 1715), *id.* (1743) (Printed by Timothy Green, New London, 1743), *id.* (1750) (Printed by Timothy Green, New London, 1750), *id.* (1769) (Printed by Thomas and Samuel Green, New Haven, and Timothy Green, New London, 1769). The "Capital Laws" provision disappears with the first post-Revolutionary revision, in 1781.

[9] Act of October 29, 1692 (2d Sess., Ch. 19), 1 Acts and Resolves of the Province of Massachusetts Bay (Published by authority, Boston, 1869–1903) 55 (disallowed by the Privy Council, August 22, 1695, 1 *id.* 56; see note 12, *infra*); Act of December 8, 1696 (3d Sess., Ch. 12), 1 *id.* 255; Act of August 31, 1706 (2d Sess., Ch. 8), 1 *id.* 595; Act of June 26, 1744 (1st Sess., Ch. 6), 3 *id.* 152; Act of March 31, 1755 (4th Sess., Ch. 34), 3 *id.* 814; cf. Act of May, 1678, Ch. XVIII, The General Laws and Liberties of Massachusetts Bay, *op. cit. supra*, note 5.

15, 1714, followed the Connecticut and Massachusetts pattern.[10]

More numerous were provisions which, in varying terms, declared that the offense of treason should be as defined, proceeded against and punished as under the laws of England. Although some of these acts in terms seem limited to incorporating the procedural or penalty provisions of the English law, they evidence a general inclination to look to that law for guidance, and none of them contains anything denying the applicability of English concepts of the scope of the offense. Such legislation is found in Delaware, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and possibly Virginia. Of the colonies, only Georgia and New Jersey seem not to have adopted legislation of one of these types.[11]

Surveillance exercised by the authorities in the mother country served, further, to enforce aware-

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[10] Acts and Laws Passed by the General Court or Assembly of His Majesties Province of New Hampshire in New England. Printed by B. Green: Sold by Eleazar Russel at his Shop in Portsmouth, 1716. (Boston, 1716; reprint, 1885); p. 46. Despite its repeal by the Crown, August 27, 1718, this act is continued in the compilations of 1726 and 1765 (same title as above), but is lacking in the compilation of 1771, with no explanation given. See 2 Laws of New Hampshire, *op. cit. supra*, note 5, p. 141.

[11] Delaware: Laws, 1719, Ch. XXII, in 1 Laws of the State of Delaware (1700–1797) (Published by Authority, Printed by Samuel and John Adams, New-Castle, 1797) 64; and Laws, 1742, Ch. LXXXIV, *id.* 225. New York: Act of June 27, 1704, 1 Colonial Laws (1664–1775), (Published under authority, Albany, 1894) 575; Act of December 24, 1767, 4 *id.* 953 (see note, p. 953). North

ness of the English law of treason in the definition of the offense in America. Thus, although the Massachusetts act of 1692 already referred to, had

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Carolina: Laws, 1711, Ch. I, 25 State Records of North Carolina (Clark, ed. Goldsboro, 1904–06) 152; Laws, 1715, Ch. XXXI, 23 *id.* 38; Laws, 1715, Ch. LXVI, 23 *id.* 94 (repealed, Laws, 1749, Ch. VI, 23 *id.* 332); Laws, 1749, Ch. I, 23 *id.* 317. Pennsylvania: Act of May 31, 1718, Ch. CCXXXVI, 3 Statutes at Large (1682–1801) (Compiled under authority by James T. Mitchell and Henry Flanders, Harrisburg, 1896–1915) p. 199. Rhode Island: "An ACT regulating sundry Proceedings in the several Courts in this Colony" (noted as 1709, 1716, 1718, 1729, 1734, 1736, 1746, 1749, 1750 and 1760), in Acts and Laws (1767) of the English Colony of Rhode Island and Providence-Plantations (Printed by Samuel Hall, Newport, 1767), p. 55; see Acts and Laws, 1728, "An Act for punishing Criminal Offences," in Acts and Laws of His Majesty's Colony of Rhode Island and Providence-Plantations, in America, 1663–1729 (Printed by James Franklin, Newport, 1730) 169. South Carolina: Act of December 12, 1712, No. 333, 1 Laws of Province (Collected by Nicholas Trott, Printed by Lewis Timothy, Charles-Town, 1736); see Grimke, Public Laws of the State of South-Carolina (Philadelphia, 1790) 34. Virginia: The applicability of English law seems fairly implied from references in Act I of the Grand Assembly Session of October 10, 1649 (note 5; *supra*); Act I of the February 1676–7 session and other legislation of that session regarding Bacon's Rebellion, 2 Hening, *op. cit. supra*, note 5, p. 366, ff.; Ch. I, of November, 1714, *id.* See Digest of the Laws of the State of Georgia (1755–1798) (Robert and George Watkins, Philadelphia, 1800) 46.

The failure of a colonial legislature to enact a law on treason might be argued to mean simply that prosecutions must be conducted under the prevailing law of the mother country. This was the opinion of the Attorney-General and Solicitor-General regarding the proper procedure against alleged traitors in New Hampshire in 1775, the

substantially copied the language of the Statute of Edward III, it was disallowed by the Privy Council, August 22, 1695, because

> in ye Article of Treason no punishment is inflicted for counterfeiting the Great Seal of England or the seal of ye Province nor is that article agreeable to the statute of the 25th of Edward the third in relation to Treason.[12]

The colonial legislature remedied the objections in the act of 1696. Again, the Commissioners for Trade and Plantations objected to the Pennsyl-

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New Hampshire treason act having been disallowed by Order in Council in 1718. See Archbold's Pleading, Evidence & Practice in Criminal Cases (31st ed. London, 1943) 1058, note (a), quoted in the opinion of the Court of Criminal Appeal in *Rex* v. *Casement* (1917) 1 K. B. 98, 143. On the other hand, there is no indication that because of this residual applicability of the English law in the colonies, the latter were ever held to be totally disabled from passing legislation on treason; and the contrary implication is to be drawn from the fact that such colonial acts as were disallowed were voided for more particularly specified reasons. The applicability of English statutes in the colonies in the absence of adoption by local authority has of course been a much mooted point, and it seems unlikely that Americans would have agreed with the opinion of the English law officers in the significant year 1775. *Cf.* Batchellor, Introduction to 2 Laws of New Hampshire, *op. cit. supra*, note 5, pp. xvii–xviii.

[12] See note 9, *supra*. The Act of December 8, 1696, *ibid.*, was probably passed to meet the objections raised by the Privy Council. Apart from adding the offense of counterfeiting the Great Seal, the 1696 Act made it treasonable to compass the death of the heir apparent, or to give aid and comfort to an enemy "in the realm or elsewhere." Other changes seem to involve terminology only.

vania Act of November 27, 1700, declaring it an offense punishable by forfeiture of half the offender's property or by one year imprisonment to compass the death of the proprietary and governor. The Commissioners stated that:

> We think this act not proper to be laid before Her Majesty, the proprietary and governor having already the same protection by law as other Her Majesty's subjects.

Accordingly, the Queen in Council repealed the act, February 7, 1705–6.[13] In New York, the Act of May 6, 1691, abjuring the royal house of Stuart, had declared it treason "by force of arms or otherwise to disturb the peace good and quiet of this their Majestyes Government as it is now Established". The home authorities found this act objectionably broad and vague and instructions were sent the governor to procure its repeal. It was, hence, repealed by the Act of June 27, 1704, whose recital reflects an influence upon the colonists to look for their law to England in this regard:

> * * * whereas her most sacred Majesty hath been graciously pleased out of her princely Care for the good and Safety of her Subjects in their Lives and Estates to observe in her Intruccons to the Governor that the meaning of the said Clause hath been of late misinterpreted to the oppression of her Subjects, and is pleased to direct that for preventing the like abuses for the future the said Clause should be repealed

[13] 2 Statutes at Large, *op. cit. supra*, note 11, 52, and note, App. I, Sect. II, p. 465.

the Laws of England having Sufficiently provided for the true purposes thereof."

[14] 1 Colonial Laws, *op. cit. supra*, note 11, pp. 223, 575; 1 Labaree, Royal Instructions to British Colonial Governors, 1670–1776 (N. Y. 1935) 157; cf. *id.* 159 (repeal of Virginia legislation regarding Bacon's Rebellion). The Act thus disapproved in 1704 had, however, originally been confirmed by the King in Council, May 11, 1697. Labaree, *loc. cit. supra*. See also Russell, Review of American Colonial Legislation by the King in Council (N. Y. 1915) 29, 104; Washburne, Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684–1776 (N. Y. 1923) 48.

As has been noted, the Duke of York's Laws, with the familiar "Capital Laws" provisions against treason (notes 3, 4, 5, *supra*), were included in the New Hampshire Act of March 16, 1679. Batchellor notes (1 Laws of New Hampshire; *op. cit. supra*, note 5, p. 10) that the authorities are in disagreement whether these laws were not subsequently disallowed by the Committee of Lords for Trade and Plantations. At any rate the copy which he reproduces, from the English archives, bears marginal notations indicating disapproval of the provisions on the ground that the matters dealt with were "provided for" and hence that the provisions should be "set aside." No explanatory ruling has been found in connection with the action of the Crown, August 27, 1718, in repealing the New Hampshire treason act of May 15, 1714. See note 10, *supra*.

The Acts of attainder and partial pardon passed by the Virginia assembly in the session of February 1676–7 in consequence of Bacon's Rebellion were disapproved in general terms by the committee of the Privy Council because the narrowness of the pardon conflicted with the King's proclamation of amnesty and because the laws were deemed to exceed the legislative powers of the colonial government, and instructions to procure their repeal were, accordingly, given the new governor. Russell, *op. cit. supra*, pp. 29–30; 1 Labaree, *op. cit. supra*, 159. The data

King v. *Bayard*, a prosecution in New York in 1702 under the Act of 1691 just noted, is the only pre-Revolutionary case of which we have an extensive record. Though the issues centered on the interpretation of the New York act, which was not couched in familiar English statutory terms, the defense resorted to Coke and the principal English statutes to evolve a theory of restrictive construction of treason legislation.[15] Law libraries in the colonies were almost non-existent until the end of the 17th century, but from then until

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is not explicit enough, perhaps, to count this as an example of royal check on colonial definition of the offense; it may, rather, constitute a curb on improper execution of the laws. Cf. note 27, *infra*.

The Trial of Nicholas Bayard for High Treason, New York City, 1702, 14 Howell's State Trials (London, 1812) 471, 478, 495, 499, 506, 10 Lawson, American State Trials (St. Louis, 1918) 518, 533, 535; Goebel and Naughton, Law Enforcement in Colonial New York (N. Y. 1944) xxiii, xxv. Though the record in Bayard's trial reflects familiarity with English trial procedure in treason cases, it may be suggestive of the limits of the material available that the able argument on the scope of the offense is drawn from English statutes and from Coke, without citation of reported decisions.

The best account of the history of treason prosecutions in a given colony is in Scott, *op. cit. supra*, note 5, pp. 154–171 (Virginia). *Cf.* Kilty, *op. cit. supra*, note 7, pp. 217–220 (Maryland). See also Chitwood, Justice in Colonial Virginia (Johns Hopkins Studies, Ser. XXIII, Nos. 7–8) 20–21; Chumbley, Colonial Justice in Virginia (Richmond, 1938) 71, 126; Records of the Particular Court of Connecticut (1639–1663) (Connecticut Historical Society, Hartford, 1928) 248; Hilkey, Legal Development in Colonial Massachusetts, 1630–1686 (N. Y. 1910) 97; Prince, An Examination of Peters's "Blue Laws" (1898) Ann. Rept. Am. Hist. Assn. 100–101.

the Revolution English treatises, statute books and Law Reports became more accessible, and it is reasonable to assume that leading lawyers of the period had opportunity, both in the legal education which some enjoyed in England, and in the books available in the colonies, to familiarize themselves with much that was written on the subject. The *Commonplace Book* of James Wilson (1767) contains quite extensive notes on the doctrines of the law of treason, obviously reflecting the use of the English lawbooks.[18]

All of this points to the fact that the several colonies drew on the general concepts of English law for the definition of treason and the incidents of its prosecution. The evidence is too scant, however, to justify any confident verdict as to how detailed was the knowledge of the mother country's law and experience in the matter; and it is consistent with the general history of the colonies' development to believe that local experience was [the most] substantial contributor to the attitudes of policy and the doctrines to be found here.

The striking characteristic of all of the pre-Revolutionary legislation in the colonies is the evident emphasis on the safety of the state or government, and the subordinate role of any concern

[18] Aumann, The Changing American Legal System (Columbus, 1940) Ch. III; Goebel and Naughton, *loc. cit. supra*, note 15; Hamlin, Legal Education in Colonial New York (N. Y. 1939) Ch. 5; cf., however, Morris, Studies in the History of American Law (N. Y. 1930) 44 ff., 67; Warren, A History of the American Bar (Boston, 1911) Ch. VIII; James Wilson's Commonplace Book was examined at the Pennsylvania Historical Society.

for the liberties of the individual. Whereas the outstanding feature of the treason clause placed in the Constitution of the United States is that it is on its face restrictive of the scope of the offense; the emphasis of colonial legislation is almost wholly affirmative. This is not surprising. Relatively weak and remote settlements, necessarily alert to the nearness of hostile empires and Indian tribes, would naturally think first in terms of positive defense against external enemies. The implications of the utility of the law of treason against domestic upset would also be mainly favorable to the official and landed or wealthy mercantile classes which dominated political affairs in the various colonies. Such laws as those passed at very early dates in the colonies north of Maryland would thus seem to have very practical explanations, and not to be designed merely to complete the logical symmetry of paper codes. The practical bases for the positive character of the colonial laws are further evidenced by the tendency for additional legislation to appear at the time of foreign wars or domestic disturbances.[17]

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[17] For legislation reflecting tensions of the French and Indian Wars, see, in Connecticut—Acts and Laws (1743) (printed by Timothy Green. New London, 1743; reprinted, Hartford, 1918) 520; Maryland—Act of May 25, 1705, Ch. V, and April 15, 1707, Ch. I, Laws of Maryland at Large, *op. cit. supra*, note 6; Massachusetts—Act of March 23, 1699–1700 (2d Sess., Ch. 21), and Acts of 1706; 1744, and 1755, 1 Acts and Resolves of the Province, *op. cit. supra*, note 9, pp. 401, 595, 3 *id.* 152, 814; New York—Act of December 23, 1755, 4 Colonial Laws, *op. cit. supra*, note 11, p. 8; Pennsylvania—Act of July 8, 1763, Ch. DI, 6 Statutes at Large, *op. cit. supra*, note 11, p. 297; Virginia—April, 1757, Ch. II, 7 Hening, *op. cit. supra*, note 5, p. 87. Legislative reflec-

The best evidence that the prevailing policy was concern for the safety of the state or government and not the careful protection of the individual citizen is in the types of conduct which the statutes declared treasonable. It has been noted that broad authority to employ martial law against "insurrection", "rebellion", "mutiny" or "sedition" was commonly conferred in original charters or proprietary grants. The crime of

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tions of domestic disturbances include, in Maryland—Ch. XXIV of the Session of April 6–29, 1650, Act of November 15, 1678, Ch. XVIII, *op. cit. supra*; New Jersey—Declaration of the Proprietors, December 6, 1672, Leaming and Spicer, *op. cit. supra*, note 5, p. 35. Laws, passed in West-Jersey, November 21, 1681, Par. XXI, *id.* 433, and Acts, 1703, Ch. III, in 1 Nevill, Acts of General Assembly of Province of New Jersey from 1703 to 1761 inclusive (Collected and published by order of the General Assembly. Printed by William Bradford, (n. p.), 1752); New York—Act of May 6, 1691, 1 Colonial Laws, *op. cit. supra*, note 11, p. 223, and Act of March 9, 1774, 5 *id.* 647, 654; North Carolina—Laws, 1711, Ch. I and Laws, 1715, Ch. XXXI, 25 State Records, *op. cit. supra*, note 11, p. 152, and 23 *id.* 38, 94, 232; Virginia—February 1676–7, Act I, 2 Hening, *op. cit. supra*, p. 366, and April, 1684, Act II, 3 *id.* 10. Legislation reflecting fundamental upheavals in the mother country include Laws of Maryland at Large, *op. cit. supra*, Acts of June 3, 1715, Ch. XXX, and August 10, 1716, Ch. V; New Jersey—1 Nevill, *op. cit. supra*, Acts, 1722, Ch. XXXIII; New York—Act of September 21, 1744, 3 Colonial Laws, *op. cit. supra*, p. 424; Rhode Island—Acts 1756 and 1766 "for the more effectual securing to his Majesty the Allegiance of his Subjects," Acts and Laws (1767), *op. cit. supra*, note 11, p. 6. Not all of these laws define offenses as "treason," but such as do not do so, are sufficiently related to treason acts in the purpose of state security and severity of penalties to be relevant evidence of the prevailing climate of policy.

compassing the death of the king—a notable omission in the treason definition finally placed in the Constitution of the United States—was copied from the Statute of Edward III by Connecticut, Maryland, Massachusetts Bay, and New Hampshire; and was in effect adopted by the seven other colonies whose legislation recognized, in one form or another, the applicability of the English law of treason within their limits. Of course, it might be contended that since the basic English Statute of Edward III has been traditionally praised as setting limits to a dangerously vague common law of treason, the mere adoption of the English laws descending from this beneficent act showed a restrictive intent on the part of colonial legislatures. In view of the practical extension of the vague categories of the Statute of Edward III by the English courts, however, this argument seems somewhat artificial, especially as applied to governments which had reason to be keenly concerned for their safety from external foes. The only plausible reason for adopting English law offered by the statute books is the claim of the "common law" as the "birthright of English subjects" in the acts by which Delaware and Pennsylvania adopted the English statutes of treason.[18]

[18] See notes 6–11 *supra*, and also The General Laws and Liberties of Massachusetts Bay, Ch. XVIII, Sect. 20 (May, 1678), The Charters and General Laws, *op. cit. supra*, note 5; and, in North Carolina, Laws, 1711, Ch. I, 25 State Records, *op. cit. supra*, note 11, p. 152, and Laws, 1715, Ch. XXXI, 23 *id.* 38, 94, 332. The Delaware act is Laws, 1719, Ch. XXII, Laws of the State of Delaware, *op. cit. supra*, note 11; the Pennsylvania statute is Act of May

Maryland and Pennsylvania went further than other colonies and made it a state offense to compass the death of the proprietor. The Pennsylvania act, as was noted above, was repealed by the Queen in Council, for a reason which reflects a desire to curb the political pretensions of the colony rather than to guard the citizen's liberties. The earlier Maryland act does not seem to have come under the disapproval of the Crown; but it was in effect for but three years. Its passage seems indicative of a climate of policy, however.[19]

31, 1718, Ch. CCXXXVI, note 11, *supra*. Compare the remark of Chancellor Kilty, quoted note 26, *infra*, reflecting the common attitude after 1789.

[19] The Pennsylvania Act of November 27, 1700, Ch. XLVII, note 13, *supra*, enacted:

> That if any person within this province or territories thereof shall compass, devise or endeavor the death, destruction or any bodily harm tending to the death or destruction, maim or wounding, imprisonment or restraint of the person of the proprietary and governor, in order to deprive or depose him of or from his government, or do stir up or assist any to invade this province or territories, such person being legally convicted thereof by the testimony of two or more credible witnesses proving the same, or by due course of law, shall forfeit half his estate real and personal, or suffer imprisonment during one whole year.

The alternative penalties seem oddly disproportionate, but the borrowing of the terms of the Statute Edward III regarding compassing, the reference to the security of the colony, the inclusion of a two-witness requirement, and the possible severity of the forfeiture make this in substance a treason act, though not expressly declared so. The act spells out forms of "compassing" which had to be devel-

The offense of levying war against the sovereign is given a broad definition in two ways in the colonial legislation. One of the major accomplishments of judicial construction of the Statute of Edward III in England was the eventual creation of the crime of treason by "constructive levying of war", the concerted effort, by violence, to set aside the laws or the authority of the government or to accomplish objects of general public policy outside the established procedures of governmental action. This was not left wholly to judicial construction, however, in the several early colonial statutes which included in their condemnation of treason the offenses of "insurrection", "publick Rebellion", or of attempting "the Alteration and Subverston of our Frame of Government Fundamentally established by His Majesties Gracious Charter", as well as "rebellion against the person of the King, State or Commonwealth, either of England or these Colonies", the "Endeavour by force of arms or otherwise to disturbe the peace good and quiet of this their Majestyes Government as it is now Established", or the speaking or writing of words questioning the King's dominion.[20] It has been noted that the

oped by the constructions of the judges in England. *Quaere*, does this imply a knowledge of the English doctrinal history? The Maryland Act of August 1, 1642, we have only in Chancellor Kilty's description (note 7, *supra*). It expressly copied the offense against the proprietor with enactment of the treasons defined by the Statute of Edward III.

[20] In addition to the legislation cited in notes 2–5, *supra*, see the Maryland Acts of May 25, 1705 and April 15, 1707, note 17, *supra*. The oath prescribed for the inhabitants of

New York Act of 1691 was repealed under instructions from the Crown, because its vague terms had been "misinterpreted" to the oppres-

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tle Kennebeck, note 5, *supra;* the New York Act of May 6, 1691, note 14, *supra;* in Virginia, Act I of the session of October 10, 1649, note 5, *supra.* Cf. Laws of Maryland at Large, *op. cit. supra*, note 6, Act of November 15, 1678, Ch. XVIII; 2 Statutes at Large of South Carolina (Edited by Thomas Cooper under Authority, Columbia, 1837), Act of December 22, 1690, No. 53, p. 44.

The unconventional terms of several other acts are worth noting. Among the Orders Made by the Court at Exeter [New Hampshire], previous to the Union with Massachusetts in 1643—i. e., in the period of town government prior to incorporation of the area into the Massachusetts colony—was that of February 9, 1640, 1 Laws of New Hampshire, *op. cit. supra*, note 5, p. 740, which provided:

> That if any person or persons shall plot or practise either by combination or otherwise, the betrayinge of the contry or any principal part thereof into the hands of any foreign State, Spanish, Dutch or French, contrary to the allegiance we profess and owe to our dread sovereign lord King Charles his heirs and successors, it being his majesties pleasure to protect us his loyal subjects, shall be punished with death.
>
> If any person or persons shall plot or practise treacherye, treason, or rebellion, or shall revile his majesty the Lord's Anointed, contrary to the allegiance we professe and owe to our dread sovereign Lord King Charles his heirs and successors (ut supra) shall be punished with death.
>
> Numb. 16
> Exo. 22, 28.
> 1 Kings 2; 8, 9, 44.

Chapter XIV of the Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province

sion of the subjects; but even this unusual pronouncement in favor of the liberty of the citizen

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of West New Jersey in America, March 3, 1676 (Leaming and Spicer, *op. cit. supra*, note 5) is perhaps the most unusual Act on domestic treason to be found in the colonies, creating a special offense on the part of members of the legislature. After reciting the obligation of the Assembly not to make laws contrary to fundamental rights defined in Chapter XIII, Chapter XIV declared:

> But if it so happen that any Person or Persons of the said free Assembly, shall therein designedly, willfully, and maliciously: move or excite any, to move, any Matter or Thing whatsoever, that contradicts or any ways Subverts, any Fundamentals of the said Laws in the Constitution of the Government of this Province, it being proved by seven honest and reputable Persons, he or they shall be proceeded against as Traitors to the said Government.

Among the Virginia laws of the session of April, 1684, Act II is reminiscent of English decisions which found a constructive levying of war in concerted plans to burn all brothels, destroy all dissenting chapels, and the like. Reciting that evilly disposed persons about May 1, 1682 and thereafter, tumultuously and mutinously assembled to cut up and destroy all tobacco plants and with force and arms in a traitorous and rebellious manner entered the plantations of many good subjects for this purpose, "to the hazarding the subvertion of the whole government, and ruine and destruction of his majesties good subjects", had not the authorities timely intervened so that some notorious actors had been convicted and executed, the Act declared its purpose to be to state the law

> to the end and purpose, that none of his majesties subjects may be at any time hereafter seduced by the specious pretenses of any persons, that such tumultuous and mutinous assemblyes, to cut up or destroy tobacco plants or any other the crop or labours of the inhabi-

was immediately balanced in the repealing statute's declaration that the laws of England

tants of the said collony, are but riots and trespasses * * *

Accordingly, it provided

That if any person or persons whatsoever, to the number of eight or above, being assembled together, shall at any time after the first day of June now next ensuing, intend, goe about, practice or put in use with force, unlawfully to cut, pull up or destroy any tobacco plants, either in beds or hills, growing within the said collony, or to destroy the same, either cureing or cured, either before the same is in hogsheads or afterwards, or to pull downe, burne or destroy the houses or other places where any such tobacco shall be, or to pull downe the fences or enclostures of any tobacco plants, with intent to cut up or destroy the same, (and such person or persons being commanded or required in his majesties name by the governour or other commander in chief; or any one of the councell, or one or more of the justices of the peace of the said collony, commanding and requireing such persons to disperse themselves, and peaceably to depart to their habitations) shall continue together by the space of four houres after such proclamation made, at or nigh the place where such persons shall be soe assembled; that then every such persons soe willingly assembled, in forceable manner, to doe any of the acts before mentioned and soe continuing together as aforesaid, and being thereof lawfully convicted, shall be deemed, declared and adjudged to be traytors, and shall suffer paines of death, and alsoe loose and forfeite as in cases of high treason.

The 1682 plant-cutting disturbances had arisen out of the effort of certain planters by this method to enforce crop restriction to cure the distress of low tobacco prices, after earlier attempts to restrict plantings by law had failed. Relying explicitly upon the English authority on constru-

"sufficiently provided" for the suppression of domestic treason.[21] Most of these acts broadly including domestic disturbance in the crime of treason antedate 1760, but there is no evidence that any were repealed or allowed to expire because they were believed to extend the scope of treason unduly. Moreover, during the 18th century all of the colonies which had passed such early, broad treason acts (except New Jersey), adopted or recognized the applicability of the

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tive levying of war, Governor Culpeper caused several prosecutions for treason to be brought, as a result of which one person was acquitted and three convicted. Of the latter, one was reprieved because of his youth and the other two hanged and their estates seized. Thereafter the act of 1684 was passed, in order—as it declares—to remove the general impression that such disturbances were mere riots. There seem to have been no trials for treason under this act. See Scott, *op. cit. supra*, note 5, pp. 159–161.

Compare the usual provision of militia laws against seditious or mutinous conduct, of which the Massachusetts Act of March 23, 1699–1700 (2d Sess., Ch. 21) (1 Acts and Resolves of the Province, *op. cit. supra*, note 9) is typical:

> That every person that shall be in his majestie's service, being mustered and in pay as an officer or souldier, who shall at any time during the continuance of this act excite, cause or joyn in any mutiny or sedition in the army, fortress or garrison whereto such officer or souldier belongs, or shall desert his majesty's service in the army, fortress or garrison, shall suffer death, or such other punishment as by a court martial shall be inflicted.

[21] See note 14, *supra*. *Cf.* Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay between 1761 and 1772, by Josiah Quincy, Jr. (Boston, 1865) 176, 221.

terms of the Statute of Edward III under which English courts were then reinforcing the concept of "constructive levying of war". Quincy (see footnote 21, *supra*) reports charges to the Grand Jury in 1765 and 1766 by the Chief Justice of the Province of Massachusetts Bay, in which the law is declared to be that:

> Levying War against the King is High Treason; as where People set about redressing public Wrongs; this, Gentlemen, the Law calls levying War against the King; because it is going in direct Opposition to the King's Authority, who is the Redresser of all Wrongs.

The other respect in which the first colonial legislation expanded the offense of levying war was by including conspiracy to levy war. The English courts had early ruled that such conspiracy did not come within the Statute of Edward III. Again, the American legislation antedates 1700.[22] But, again, it must be pointed out that during the 18th century all of these jurisdictions (except New Jersey) together with others, either copied the terms of the Statute of Edward III into their books, or recognized the applicability of English treason law within their boundaries, including the offense of compassing the king's death, which by now had been construed by the English courts in effect to cover conspirary to

[22] Legislation cited in notes 2–5, *supra;* the Maryland Acts of May 25, 1705 and April 15, 1707, note 17, *supra;* the Exeter Order of February 9, 1640, note 20, *supra;* the New York Act of May 6, 1691, note 14, *supra;* the Pennsylvania Act of November 27, 1700, note 19, *supra.*

levy war.[23] It would be artificial to hold that these colonies thereby consciously adopted all of the constructions of the king's courts; but it is equally true that this record cannot be taken to evidence an intent to narrow the scope of the offense.

Certain colonial statutes of the French and Indian Wars, following English models, suggest an extension of the bounds of the offense of adhering to the enemy, and have special interest, because they foreshadow legislation of the same type in the Revolutionary period. The Massachusetts Bay Act of August 31, 1706, "For preventing all traiterous correspondence with the French king, or his subjects, or the Indian enemy or rebels, and supplying them with warlike or other stores," declared it high treason to furnish provisions to the enemy, and also made it treason

> * * * if * * * any person or persons shall, during the continuance of the present war with France, be convicted of holding a traiterous correspondence with any of her majesty's enemies, by letters or otherwise, whereby they shall give them intelligence tending to the damage of her majesty's subjects or interests, or to the benefit or advantage of the enemy. * * *

It was likewise declared high treason

> * * * if any of her majesty's subjects within this province shall * * * during the continuance of the present war with France, without license from her majesty's governour or commander-in-chief of this her majesty's province for the time

[23] 8 Holdsworth, History of English Law (2d ed. London, 1937) 313, 314, 318.

> being, by and with the advice and consent of the council, voluntarily go, repair or embarque in or upon any vessel or vessels, with an intention to go into, reside or inhabit in any of the dominions or territories of the said French king, or amongst any of the Indian enemy or rebels aforesaid * * *

The Act contained a proviso:

> That nothing in this act contained shall be construed, intended, deemed or taken to extend to bar the necessary relief and supply of any French prisoners of war, or of any flagg of truce, or to the supply of the English prisoners in French or Indian hands; or for secret services made or done, at all times, by the direction of the governour, with the advice of the council; or to bar a present charitable relief to any of the enemy that by adversity may be cast on shoar upon this coast, for the necessary preservation of life; intelligence thereof to be forthwith despatch'd to the governour.[24]

The broad terms of this statute raise the interesting question, whether under it, a specific intent to betray the colony must be shown to convict. This is the implication, *prima facie*, of the prohibition of "traiterous" correspondence, but the adjective might also be taken to be adequately explained by what follows; and the remainder of the provision in terms condemns a correspondence which in fact conveys information tending to damage the colony or benefit the enemy, without mention of an intent thereby to betray the colony.

[24] 1 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 595; 3 *id.* 152.

The terms of the next section, regarding unlicensed departure for enemy territory, include no innuendo of a showing of specific intent thereby to give aid or comfort to the enemy; an unlicensed departure on private busines for profit or to go to family or friends would seem within the ban. Where the penalty of death and forfeiture of property is involved, a court would normally rule as a matter of course that a guilty mind was intended to be an element of the offense; but this argument here begs the question, which is whether in view of the likelihood of peril to the state, the guilty mind does not consist in the intention which puts the actor in so ambiguous a situation, regardless of any further showing of a specific motive to betray. That the act was intended to be taken in a broad sense, is suggested by the proviso, which excludes matters which it would otherwise seem needless to mention. Perhaps the strongest argument against the broad interpretation is that the offense of "traiterous correspondence" is linked in the act with that of selling or delivering provisions to the enemy, an offense which in wartime can hardly be treated as open to innocent explanation.

An Act of substantially similar terms was passed June 26, 1744, in the same colony (see footnote 24, *supra*). These should be compared with the series of statutes beginning with the Act of March 29, 1755, which forbade citizens of the province "to hold any correspondence or communication with any inhabitants of Louisburgh or any other of the French settlements in North America, either by land or water", and penalized violation by forfeiture of vessel and cargo, and,

for the vessel's master, loss of one ear and 39 lashes and deprivation of the right to hold any office of trust or honor under the province. Since the preamble recited that the statute was designed to prevent knowledge of gathering plans against Louisburgh from reaching the French, it seems particularly likely that its sweeping prohibition was meant to be taken without the requirement of showing a specific intent to betray.[25]

If the colonial legislation thus shows an almost unbroken trend to put the interest in community security first in defining the types of conduct which shall be deemed treasonable, it is equally true, however, that it displays a persistent concern for safeguarding the individual regarding the quantum of proof and the decencies of procedure. Certain early statutes required at least two witnesses to prove any capital offense. From the latter part of the 17th century on, in most of the colonies the two-witness requirement and the procedural guaranties laid down by the Statute of 7 William III in treason trials were expressly enacted by reference to that statute or to the English statutes on treason generally.[26] The wit-

[25] 3 *id.* 814; cf. Act of June 14, 1755 (1st Sess., Ch. 6), *id.* 865, and Act of February 25, 1757 (7th Sess., Ch. 25), *id.* 1027.

[26] The earliest act requiring two or more witnesses for capital offenses in general seems to be Laws of New Haven Colony, *op. cit. supra*, note 2, p. *17:

> That no man shall be put to death, for any offence, or misdemeanour in any case, without the testimony of two witnesses at least, or that which is Equivalent thereunto, provided, and to prevent, or suppresse much inconvenience, which may grow, either to the publick, or to particular Persons, by a mistake herein, it is

ness requirement of course meant simply a requirement of two witnesses without the specification laid down subsequently in the United States Constitution, that they be to the same overt act. On the other hand, pursuant to the statute of William III, they must be witnesses to the same

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Ordered, and declared, by the Authority aforesaid, that two, or three single witnesses, being of competent age, of sound understanding, and of good Reputation, and witnessing to the case in question (whither it concerne the publick peace, and welfare, or any one, and the same particular person) shall be accounted (the party concerned, having no just exception against them) sufficient proofe, though they did not together see, or heare, and so witnesse to the same individuall, any particular Act, in reference to those circumstances of time, and place.

None of the General Laws of Connecticut, however, adopted this provision. Chapter I, "The Generall Fundamentals", of The General Laws and Liberties of New Plimouth Colony, 1671 (The Compact with the Charter and Laws, *op. cit. supra*, note 4, p. 242), provided

6. That no Man be Sentenced to Death without Testimonies of two witnesses at least, or that which is equivalent thereunto, and that two or three Witnesses being of competent Age, Understanding and of good Reputation, Testifying to the case in question, shall be accounted and accepted as Full Testimony in any case, though they did not together see or hear, and so Witness to the same individual Act, in reference to circumstances of time and place: Provided the Bench and Jury be satisfied with such Testimony.

In New Jersey, the Act of May 30, 1668 (Laws in Carteret's Time, from 1664 to 1682, Leaming and Spicer, *op. cit. supra*, note 5, p. 84), stated that

Concerning taking away of a Man's Life, It is Enacted * * * that no Man's Life shall be taken

treasonable offense, and one witness to each of two separate, or at least different types, of treason, would not suffice.

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away under any Pretence but by Virtue of some Law established in this Province, that it be proved by this Mouth of two or three sufficient Witnesses.

A similar declaration regarding all crimes was contained in Ch. XX of the Concessions and Agreements of the Proprietors, etc., March 3, 1676, cited note 20, *supra*.

Statutes providing generally for conviction of treason of persons "provably attainted of open deed upon the testimony of two lawful and credible witnesses upon oath", or expressly providing that trials in treason cases should be regulated according to the Act of 7 William III, are cited in notes 8–11, *supra*. And see Pennsylvania Act of November 27, 1700, note 19, *supra*. Chancellor Kilty, *op. cit. supra*, note 7, pp. 217–220, notes, regarding indictments brought in Maryland in 1706 and 1707 for feloniously and traitorously receiving one Richard Clarke, outlawed on a charge of conspiracy to overthrow the government, that

> * * * the record in the first [case] states, that the prisoner (when brought to be tried) had, before that time, had a copy of the indictment, and a copy of a panel of jurors delivered to him, according to the form of the statute. This was the statute 7 W. 3, Ch. 3, and in the last case the prisoner declared, that he was ready; that he wanted no process for witnesses, &c., that he released, or rather declared, that he had a copy of the indictment and panel, and forewent any advantage for the trial before due time fixed by the statute 7 king William for regulating trials in high treason, and on misprision of treason. That statute having been thus recognized furnishes strong evidence if it were necessary that the one now under consideration [25 Edw. III, Stat. 5] was in part adopted also, being essential to the safety of the inhabitants, as defining what offenses only should be treason.

The records of prosecutions or decisions in treason cases in the colonial period are too scanty to be of much help in seeing the trend of policy. In particular, nothing helpful has been found to illuminate the borderline cases of adherence to the enemy. Almost all the cases which had sufficient color and interest to cause the preservation of some record were cases of domestic insurrection—"constructive levying of war". Where political difference rose to the degree of armed resistance that it did in Bacon's Rebellion, in Virginia, in 1675–6, there was clearly treason, if domestic disturbance were to be recognized as within the offense at all; the question of a wise executive clemency in the case is something again.[27] On the other hand, there is evidence that there were cases of abuse by prosecutions for political differences which should not have been deemed to carry such a threat of subversion of the state as to be treasonable. Such a case seems the celebrated *King* v. *Bayard*, in New York in 1702.[28] But there is a total lack of any specific evidence to show that

[27] Note 14, *supra*, and Scott, *op. cit. supra*, note 5, pp. 156–159. See 1 Morison and Commager, The Growth of the American Republic (N. Y. 1942) 80: "Berkeley rounded up the leaders and had thirty-seven of them executed for treason. 'That old fool has hanged more men in that naked country than I have done for the murder of my father,' exclaimed Charles II."

[28] Note 15, *supra*. Executive action against persons guilty of what amounted probably to "constructive levying of war" is reflected in Chapter XXIV of the Laws of the Maryland General Assembly of April 6–29, 1650, Laws of Maryland at Large, *op. cit. supra*, note 6 and in Kilty's account of the prosecutions of 1706 and 1707, note 26, *supra*; in New Jersey, by the Declaration of the Proprie-

such incidents were sufficiently numerous or outrageous as to form a current of opinion that the scope of treason must be narrowed for the safety of the citizen. None of the restrictive arguments urged at the time of the drafting and ratification of the Federal Constitution has been found which is based on an appeal to American colonial experience in this regard.

(b) The Revolution: 1775–1783

As a matter of law, the Revolution called for new legislation on treason, for new political entities had arisen to claim allegiance, betrayal of which was treason.[2] As a matter of fact, the dangers from disaffected persons in the colonies, and in the new states, were so clear and pressing as naturally to produce legislative reactions. Scattering provisions in the new state constitutions banned legislative attainders, abolished corruption of blood as a penalty, limited the pardoning power of the executive, or required trial in the county where the offense was committed; but none spoke of the scope of the offense or the nature of its

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tors, December 6, 1672, III (Leaming and Spicer, *op. cit. supra*, note 5, p. 35), paragraph XXXVII of the Acts in Assembly of November 5, 1675 (Laws in Carteret's Time, *id.*), paragraph XXI of the Acts and Laws of the Assembly of November 21, 1681 (Laws Passed in West-Jersey, *id.*), and the Laws, 1703, Ch. III (1 Nevill, *op. cit. supra*, note 17), and in New York, in addition to the Act of May 6, 1691, by the Act of March 9, 1774 (5 Colonial Laws, *op. cit. supra*, note 5, pp. 647, 654).

[2] *Cf.* Kent, Ch. J., in *Jackson* v. *Catlin*, 2 Johns (N. Y.) 248, 260 (1807); see note 66, *infra*.

proof. New statutes in most states undertook to define the offense and prescribe for proof and trial procedure; and about this nucleus clustered other legislation, sometimes elaborating the scope of the crime, sometimes creating ancillary offenses—disloyal utterances, traffic with the enemy, confiscation of property of disaffected persons—which help indicate the views of policy with which the offense was approached. Summary executive action amounting to less than the full penalty for treason finds frequent reflection in the histories of the times; but, as in the earlier period, records of trials for treason are scant and do not contribute as much as the statutory material to outlining the attitudes taken towards the crime.[30]

The Revolution does not break the thread of continuity with traditional English materials defining the scope of treason. When the Continental Congress, on June 24, 1776, adopting the recommendation of its "Committee on Spies", recommended to

[30] As to the reality of the danger from disaffected persons, see Paltsits, Minutes of the Commissioners for detecting and defeating Conspiracies in the State of New York, 1778–1781 (3 vol. Albany 1909), *passim*. That the reason for the paucity of civil trials for treason was not any lack of a problem, but rather the resort to summary administrative or court martial handling of cases, see Paltsits, *supra*, *passim*, and Van Tyne, The Loyalists in the American Revolution (N. Y. 1929), 271, 272. Further examples will be found in Davis, The Confiscation of John Chandler's Estate (Boston, 1903), Ch. III; De Mond, The Loyalists in North Carolina During the Revolution (Durham, 1940), *passim*; Harrell, Loyalism in Virginia (Durham, 1926), *passim*; Nye, ed., Sequestration, Confiscation and Sale of Estates, 6 State Papers of Vermont (n. p. 1941), *passim*.

the colonies that they pass treason legislation, it used the familiar terms of the Statute of Edward III, with a suggestion of the evidentiary requirements of the Statute of 7 William III:

> *Resolved*, That all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or make [sic] a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe, during the same time, allegiance thereto:
>
> That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony:
>
> That it be recommended to the legislatures of the several United Colonies, to pass laws for punishing, in such manner as to them shall seem fit, such persons before described, as shall be proveably attainted of open deed, by people of their condition, of any of the treasons before described.[31]

[31] 5 Journals of the Continental Congress (Government Printing Office, Washington, 1928) 475; Force, American Archives (Washington, 1846), 4th Ser., v. VI, p. 1720. The composition of the committee which recommended the resolutions is stated in C. F. Adams, Life of John Adams, 1 Works of John Adams (Boston, 1856) 224–225.

The committee which had recommended the resolutions included John Adams, Thomas Jefferson, John Rutledge, James Wilson and Robert Livingston. The familiar words of the resolutions apart, it would be incredible that this distinguished group of lawyers and students of the law did not draft their suggestions with a background of English law in mind, and at least in the case of Jefferson and Wilson we know that they had previous familiarity with English materials. In the course of the next year, the advise of the Continental Congress was taken by most of the states, which adopted basic statutes employing the recommended formula. In the minority states which anticipated the Congressional suggestion, or thereafter adopted substantially differing legislation, the key definition of the offense was still in terms similar to the Statute of Edward III.

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[32] See "Instructions for the Deputies appointed to meet in General Congress on the part of this Colony", August, 1774, 1 The Writings of Thomas Jefferson (Library ed., Washington, 1903) 13, 211, 215; James Wilson's Commonplace Book (1767), note 16, *supra*.

[33] The following states substantially adopted the Congress' recommendation. Delaware: Act of February 22, 1777 (General Assembly session of October 28, 1776, Ch. LXXXVIII; p. 359), bound with Laws of the Government of New-Castle, Kent and Sussex upon Delaware (Printed by James Adams, Wilmington, 1763) (See Act of June 26, 1778, p. 44; the 1777 Act was limited by its terms to the duration of the present war, and was apparently allowed to lapse, leaving in effect the general adoption of the English laws by Delaware Laws, 1792, Ch. XXII (note 11, *supra*), limited by Delaware Constitution, 1792, Art. V, Sect. 4; copied from the provision of the United States

Moreover, the terms of subsidiary legislation punishing disloyal utterances, sometimes as treason, sometimes as lesser offenses, suggest analogies

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Constitution. See 2 Laws of the State of Delaware, *op. cit. supra*, note 11, p. 595. Massachusetts: Act of February 1, 1777 (3d Sess., Ch. 32), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 615. New Hampshire: Act of January 17, 1777; Acts and Laws (1776–80) of the State of New Hampshire in America. (By order of the General Assembly. Exeter, 1780). New Jersey: Act of October 4, 1776 (1776, Ch. V), Acts of Council and Assembly (1776–83), from establishment of present government to Dec. 24, 1783. (By Peter Wilson, compiler. By authority. Trenton, 1784). New York: Resolution of the Convention of Representatives of the State of New York, July 16, 1776, Force, American Archives, *op. cit. supra*, note 31, 5th Ser., v. I, pp. 446–447. North Carolina: Ordinance of December 23, 1776 (Ordinances of Convention—1776), 23 State Records, *op. cit. supra*, note 11, p. 997; see also Laws, 1777, (1st Sess.) Ch. III, and Laws, 1777 (2d Sess.), Ch. VI, 24 *id.*, 9, 84. Pennsylvania: Act of September 5, 1776, Ch. DCCXXXII, 9 Statutes at Large, *op. cit. supra*, note 11, p. 18; see Act of February 11, 1777, Ch. DCCXL, *id.* 45. Rhode Island: Acts, May, 1777, (2d Sess.), p. 30. Though not copying the full form of the act recommended by Congress, Chapter III of the Virginia statutes, October, 1776 (9 Hening, *op. cit. supra*, note 11, p. 168), should be counted among the acts stemming from the Congressional advice, since we know that Thomas Jefferson at least participated in the writing of the act after he had left the Continental Congress to take his seat in the Virginia House of Delegates. The index of the Clerk of the House of Delegates, for the Journal for 1776 notes, under date of October 28, 1776, "TREASON. Leave for bill Declaring what shall be treason, with resolutions of General Congress. Referred to a committee (Messrs. Bullitt, Griffin, Lee, Cuple, Henry, and Jefferson) to prepare." (Reference through the courtesy of Mr. William J. Van Schreeven, Head Archivist,

in test oath provisions which the colonial laws had adopted from England.[*] The few treason

Virginia State Library, Richmond). See 1 Randall, Life of Jefferson (N. Y. 1858) 203, 205; Kean, Thomas Jefferson As A Legislator (1887) 11 Va. Law Jour. 705, 714.

Statutes differing in greater degree from the recommendation of the Continental Congress, whether or not antedating that suggestion, are the Connecticut Act of October, 1776 in Acts and Laws (1784) (Printed by Timothy Green, New London, 1784) 25[illegible]; *cf.* Acts and Laws, 1781, *id.* 569. Maryland: Act of April 20, 1777 (Feb. 1777 Sess.), Ch. XX, in 1 The Laws of Maryland (Revised and Collected under Authority of the Legislature by William Kilty) (Annapolis, 1799 and 1800). South Carolina: Act of April 11, 1776, No. 1017, 4 Statutes at Large, *op. cit. supra*, note 20, p. 343. Compare Vermont, Acts and Laws, 1779, p. 6. Georgia does not appear to have enacted any general treason act, though numerous separate acts of attainder were passed. See 19 Colonial Records of the State of Georgia (Atlanta, 1911), Part II, p. 673; *cf.* Digest of the Laws of the State of Georgia (1755-1800) (Marbury and Crawford, Savannah, 1802) 62, 111.

Force, American Archives, *op. cit. supra*, note 31, gives data regarding several of the state acts: 4th Ser., vol. V, 1804 (Connecticut), VI, 1560 (Maryland), VI, 1648 and 5th Ser., I, 412 (New Jersey); 5th Ser., vol. I, 446 (New York), 549 (Rhode Island) and 1210 (Pennsylvania).

Lists of test oath laws and of the "principal" laws directed against the Loyalists in the American Revolution are contained in Van Tyne, The Loyalists in the American Revolution (N. Y. 1929) App. B and C, pp. 318, 327.

[*] Compare, *e. g.*, New York Act of September 21, 1744, 3 Colonial Laws, *op. cit. supra*, note 5, p. 424, and Rhode Island, Acts, 1756, 1766, in Acts and Laws (1767), *op. cit. supra*, note 11, p. 6, with Massachusetts, Act of May 1, 1776 (4th Sess., Ch. 21), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 479; New York Act of March 30, 1781 (4th Sess., Ch. XLVIII), in Laws of the State of

cases of the period, reported in the volumes of Dallas, show counsel to be familiar with the basic English statutes and treatises; but it may be significant of the limitations of local law libraries that in his argument in *Respublica* v. *Carlisle*, in 1778, the Attorney General of Pennsylvania cites *Lord Preston's* case from Foster's treatise and not from the reports. Similarly, Chief Justice McKean's notes of the argument made by James Wilson for the defense in the *Carlisle* case show Wilson as relying on the English statutes and treatises, with no mention of any citation to the reports.[38] But, if American lawyers and statesmen did not have the detailed development of English judge-made law at their finger tips, the evidence and the probabilities clearly establish that they drew their ideas of the scope of the offense and the nature of proceedings therein from important English materials.

Continuity with the colonial period also marks the time of the Revolution with respect to the definition of the scope of the offense. The strug-

New-York. [Printed by John Holt. Poughkeepsie, 1782) 189; Rhode Island, Acts, July, 1776, p. 133.

[38] See notes of arguments in Respublica v. Malin, 1 Dallas 33 (Pa. Ct. of Oyer & Terminer, 1778); Respublica v. Carlisle, *id.* 34, 36; Respublica v. Roberts, *id.* 39. In the "Notes of C. J. McKean in case of Ab'm Carlisle, 1778", 7 Pennsylvania Archives (Hazard, ed. Philadelphia, 1853) 44-52, Wilson cites Blackstone, Hale, and Hawkins, and the statutes of 25 Edw. III; 1 Edw. VI, 1 & 2 Ph. & M., Ch. 10, 7 Wm. III, Ch. 3, and 7 Anne Ch. 21. Hazard states (*op. cit. supra*, 52, note), that Mr. Chief Justice McKean's notes on the arguments in the Roberts case could not be found.

gle with Great Britain was bitterly fought and the outcome long in doubt, with neighbor divided from neighbor and suspicion prevalent. In this atmosphere, it was to be expected that the dominant emphasis, as in the preceding period, would be on the security of the state, rather than the liberty of the individual.

However, the break with England itself produced the first manifest distrust of the abuse of treason trials, and the Revolutionary years show the definite beginnings of the wary policy which was to find expression in the Federal Constitution. In his draft of "Instructions for the Deputies appointed to meet in General Congress on the part of this Colony" (August, 1774), Thomas Jefferson raised the issue of the definition of "treason". Noting General Gage's proclamation, in Massachusetts, declaring it treason for the inhabitants to assemble to consider grievances and to form associations in this connection, Mr. Jefferson argued that:

> If he considers himself as acting in the character of his Majesty's representative, we would remind him that the statute 25th, Edward the Third has expressed and defined all treasonable offences, and that the legislature of Great Britain had declared, that no offence shall be construed to be treason, but such as is pointed out by that statute, and that this was done to take out of the hands of tyrannical Kings, and of weak and wicked Ministers, that deadly weapon, which constructive treason had furnished them with, and which had drawn

> the blood of the best and honestest men in the kingdom. * * *[36]

The burden of complaint with regard to the law of treason, so far as the great public debate was concerned, related, however, to an important matter of procedure. Among the grievances recited by the Continental Congress in the preamble to its resolutions declaring the rights of the colonies, adopted October 14, 1774, was the fact that:

> * * * it has lately been resolved in Parliament, that by force of a statute, made in the thirty-fifth year of the reign of king Henry the eighth, colonists may be trans-

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[36] 1 Writings, *op. cit. supra*, note 32, pp. 241, 215. As Secretary of State, in his letter of April 24, 1792, to Messrs. Carmichael and Short, giving instructions regarding negotiations with Spain, Jefferson explained why this country would not wish to agree to surrender political refugees:

> Treason, * * * when real, merits the highest punishment. But most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government*, and acts against the *oppressions of the government*: the latter are virtues; yet they have furnished more victims to the executioner than the former; real treasons are rare; oppressions frequent. The unsuccessful struggles against tyranny, have been the chief martyrs of treason laws in all countries. * * *

8 *id.* 332; compare the Notes on Virginia (1782), 2 *id.* 216. Writings, *op. cit. supra*. With his disappointment at the failure to convict Burr fresh in mind, President Jefferson emphasized the need for re-examining the adequacy of the extent of the offense rather than its limitations, in his Seventh Annual Message (1807), 3 *id.* 451–452.

> ported to England, and tried there upon accusations for treasons, and misprisions, or concealments of treasons committed in the colonies; and by a late statute, such trials have been directed in cases therein mentioned.[37]

Abuse of treason trials was not listed, in explicit terms, by the Declaration of Independence among its charges of oppressive conduct, but both the scope of prosecutions threatened and the unfairness of trials in remote England seem to be protested in the complaint "For transporting us beyond seas to be tried for pretended offences: * * *[38]"

As has been seen, Jefferson participated in drafting both the treason act which the Congress recommended to the colonies on June 24, 1776, and the Virginia treason statute of October, 1776. There seems to be no record of the policy deliberations of the draftsmen of these measures. It was pointed out in the analysis of the colonial legislation, that the mere use of the terms of the Statute of Edward III is ambiguous on the issue of exten-

[37] 1 Journals, *op. cit. supra*, note 31, p. 63, 65. See the more elaborate statement of this complaint in the "propositions offered by J. Duane, to the Committee for stating Rights, Grievances and the Means of Redress. In Congress at Philadelphia, between 7th and 22d September, 1774", 1 Burnett, ed., Letters of Members of the Continental Congress (Washington, 1921) 43, 44, n. 36.

[38] This was a highly practical point in the fears and resentiments of colonial leaders. See Joseph Hewes to James Iredell, Philadelphia, 31st Oct. 1774, 1 Burnett, *op. cit. supra*, note 37, p. 83; 1 Van Tyne, The Founding of the American Republic (Boston, 1922) 301–305.

sive versus restrictive intent.[39] The situation may now, however, be altered, since, as Jefferson's essay of 1774 shows, there was now a political reason to emphasize the tradition which makes the Statute of Edward a restrictive act. Moreover, the new American treason acts included no provision analogous to that of compassing the king's death. This omission was of course logically explainable on the ground that in a republic there was no proper place for an analogous offense, that the state alone, and not the head of the state, was to be given the protection of this dread penalty, and that it was adequately protected by the provisions against levying war or adhering to enemies. There seems to be no contemporary exposition of this theory, however, and its logic is a bit too pat to seem a convincing explanation of the rather haphazard processes of state legislation of that day.[40] It is altogether likely that in most states, the offense of compassing the death of the king was dropped for no more elaborate reason than that there was no longer a king. On the other hand, one cannot make such assumptions about legislation in the drawing of which Thomas Jefferson had a hand. We may draw some further light from the notes which Jefferson wrote to Chancellor Wythe, November 1, 1778, regarding Jefferson's proposed "bill for proportioning Crimes and Punishments, in cases heretofore Cap-

[39] Note 18, *supra*.

[40] Substantially the argument outlined is offered in 2 Swift, A System of the Laws of the State of Connecticut (Windham, 1796), 297; Rawle, A View of the Constitution of the United States (2d ed. Philadelphia, 1829) 141

ital." Jefferson proposed a section providing [footnotes are his]:

> [2] If a man do levy war [3] against the Commonwealth [*in the same*], or be adherent to the enemies of the Commonwealth [*within the same*][4], giving to them aid or comfort in the Commonwealth, or elsewhere, and thereof be convicted of open deed, by the evidence of two sufficient witnesses, or his own voluntary confession, the said cases, and no [5] others, shall be adjudged treasons which extend to the Commonwealth, and the person so convicted shall suffer death, by hanging, and shall forfeit his lands and goods to the Commonwealth.

In his footnotes, Jefferson explained the policies behind his draftsmanship:

> [2] 25 E. 3. st. 5 c. 2. 7. W. 3. c. 3 §2.
>
> [3] Though the crime of an accomplice in treason is not here described, yet, Lord Coke says, the partaking and maintaining a treason herein described, makes him a principal in that treason; it being a rule that in treason all are principals. 3 Inst. 138. 2 Inst. 590. 1 H. 6. 5.
>
> [4] These words in the English statute narrow its operation. A man adhering to the enemies of the Commonwealth, in a foreign country, would certainly not be guilty of treason with us, if these words be retained. The convictions of treason of that kind in England have been under that branch of the statute which makes the compassing the king's death treason. Foster 196, 197. But as we omit that branch, we must by other means reach this flagrant case.
>
> [5] The stat. 25 E. 3. directs all other cases of treasons to await the opinion of Parlia-

> ment. This has the effect of negative words, excluding all other treasons. As we drop that part of the statute, we must, by negative words, prevent an inundation of common law treasons. I strike out the word 'it', therefore, and insert 'the said cases, and no others.' Quaere, how far those negative words may affect the case of accomplices above mentioned? Though if their case was within the statute, so as that it needed not await the opinion of Parliament, it should seem to be also within our act, so as not to be ousted by the negative words."[a]

From this it appears that Jefferson was alert to the fact that the law of "constructive treasons" had grown in important cases under the "compassing" phraseology which the American acts had omitted; and that in his eyes it was not the clauses stating particular types of treasonable conduct, so much as the provision requiring Parliamentary action on novel cases, that gave the Statute of Edward III its restrictive character. Foreshadowing his later distrust of judicial law-making, Jefferson sees the need of new limiting language, if there are not to be new "common law", i. e., judge-made treasons. Plainly, in 1778 he favors a general policy of limiting the scope of the offense. On the other hand, like the draftsmen of the Federal Constitution, he wished the law to give firm protection to the state within the area

[a] 2 Writings, *op. cit. supra*, note 32, pp. 216, 218, 220-221. Jefferson's proposed revision of the criminal code failed of enactment by one vote in 1785; legislation of similar type was finally obtained in 1796. *Id.*, 257. See Kean, *op. cit. supra*, note 33, p. 714.

embraced by the definition: hence his extended definition of "adhering to the enemy". And his analysis of the liability of accomplices introduces a most important limitation on his general restrictive approach, for he is apparently ready to accept the words of 25 Edward III Ch. 2 plus at least some of the gloss put upon them by the English judges. In the letter transmitting his draft bill on punishments to Chancellor Wythe, Jefferson explained his general approach in this regard:

> In its style, I have aimed at accuracy, brevity, and simplicity, preserving, however, the very words of the established law, wherever their meaning had been sanctioned by judicial decisions, or rendered technical by usage * * * And I must pray you to be as watchful over what I have not said, as what is said; for the omissions of this bill have all their positive meaning. I have thought it better to drop, in silence, the laws we mean to discontinue, and let them be swept away by the general negative words of this, than to detail them in clauses of express repeal * * *[42]

This is a natural inclination in a professional draftsman, using words of art; but it obviously makes possible considerable nullification of the policy of limiting the bounds of the crime.

Whether or not his ideas directly or indirectly reached any of the framers at Philadelphia, the

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[42] 1 Writings, *op. cit. supra*, note 32, p. 216. In the "Note" which Jefferson later wrote on his achievements in the legislature, he commented, regarding his proposed revision of the criminal code, that "The text * * * had been studiously drawn in the technical terms of the law, so as to give no occasion for new questions by new expressions." *Id.* 257.

trend of Jefferson's thought so plainly resembles that of the restrictive clause inserted in the Federal Constitution as to suggest a kind of thinking which must have been in the air for some time before 1787. But the Revolutionary period gives us more direct testimony on this point, from one of the men who drew the constitutional provision. In 1778, in Philadelphia, spurred by the indignation of patriots, the commonwealth prosecuted for treason several persons who had had various relations with the British during their occupation of that city. James Wilson, leading figure on the American side, was also a leader of the bar, and, moreover, a fundamentally conservative man not in sympathy with the more radical and vociferous wing of the patriotic movement. The accused had been men of some standing, and much contemporary, as well as subsequent, opinion was that they were handled with unjust severity. There is, therefore, room to believe that, as one of the defense counsel in this group of cases, Wilson spoke with more than mere advocate's zeal. Like Jefferson, he now saw a restrictive policy to be deduced from the Statute of Edward III. According to the notes of his argument in *Respublica* v. *Carlisle*, taken by Mr. Chief Justice McKean, Wilson contended:

> Treason at common law indefinite & not ascertained, 1 Hawk. fo., 34; 4 Blackstone pa. 75; 1 Hale fo. 81. By 25th Edw. 3, ch. 2, it is ascertained and fixed; the Parliament who enacted this act are called the *Benedictum Parliamentum*, the only rule ever since in England, except that by the 7th William, the prosecution must be within 3 years . . .

And the Chief Justice notes the following brisk exchange between prosecution and defense:

> Mr. Serjeant, Attorney General, What was treason at common law, the arbitrary proceedings in arbitrary reigns, are nothing to the present question.
>
> 4. Blackstone, 352 & 3; Laws of Pennsylvania very different & more beneficial. * * *
>
> Replication by Mr. Wilson.
>
> If the Statutes are not extended here, we shall be all afloat as if we were before the 25th Edwd 3, ch. 3.[43]

None of the decisions in the Pennsylvania treason trials mounted to the level of a legal classic, but the opinions are marked with judicial restraint and it appears that the court was careful of the rights of the defendants. However, in the opinions in the *Malin* and *Roberts* cases—in which alone does the court discuss the scope of the offense—the rulings tend to extend the limits of the crime. In the *Malin* case the defendant, mistaking a corps of American troops for British, went over to them. The Attorney General offered evidence of the defendant's words to prove his mistake and real intent. Sustaining the defense

[43] Cases and material cited note 35, *supra*. See Nevins, The American States During and After the Revolution (N. Y. 1924) 256; Loyd, The Early Courts of Pennsylvania (Boston, 1910) 126; Alexander James Wilson, Nation Builder (1907) 19 Green Bag 107; Konkle, James Wilson and the Constitution (Philadelphia, 1907) 19. Alexander suggests that the harsh suppression and penalizing of the Jacobite rebellion of 1745-1746, in the Scotland of Wilson's youth, was likely a significant element in shaping his political attitudes. 19 Green Bag No. 1, 1, 4.

objection to the introduction of such evidence, the court offered the dubious explanation, that there was no "act" of treason, but admitted the evidence for another purpose:

> No evidence of words, relative to the mistake of the *American* troops, can be admitted; for any adherence to them, though contrary to the design of the party, cannot possibly come within the idea of treason. But, as it appears that the prisoner was actually with the enemy, at another time, words indicating his intention to join them are proper testimony, to explain the motives upon which that intention was afterwards carried into effect."

In the *Roberts* case, the court agreed with the defense contention that under the Pennsylvania statute penalizing the "persuading others to enlist" in the enemy army, a case was not made out where it appeared that the person approached refused so to enlist. However, under the charge of adhering to the enemy by himself enlisting, the court noted that "There is proof of an *overt* act, that the prisoner did *enlist*", and said that the evidence of his unsuccessful attempt to persuade the other to enlist "is proper to show *quo animo* the prisoner himself joined the British forces."[44] Both cases plainly draw a line between proof of the requisite overt act and proof of the intent.

[43] 1 Dallas 33. The court's ruling on the first point seems clearly unsound, and is contrary to the great weight of authority in the American treason cases. See essay on the American cases, notes 59–61.

[44] *Id.* 39.

The practical effect of such an analysis would seem to be to broaden the types of conduct which may be relied on as the overt act necessary to make out the crime.

Thus the period of the Revolution introduces cautionary notes regarding the scope of "treason" such as were not seen in the colonial era; but the evidences of the new trend are only suggestive and wavering in their implications. The burden of the story remains, the security of the state.

The clearest complaint of the Declaration of Independence, it has been seen, was with reference to oppressive trial practice regarding treason, rather than to the breadth of the crime. There is no evidence that the colonial period had left a specific legacy of fears about abuses in treason trials, though there had quite clearly been cases of such abuse. It is, therefore, not surprising to find that none of the new state constitutions, prior to 1790, includes any limitation on the scope of the offense or the type or amount of proof.[46]

[46] Treasons must be tried in the county where committed: Georgia, Constitution of 1777, XXXIX. The governor may reprieve, but only the legislature may pardon, in cases of treason: Georgia, Constitution of 1789, II, 7; Pennsylvania, Constitution of 1776, Sect. 20 of the Plan of Frame of Government. No person shall be attainted of treason or felony by the legislature; there shall be no corruption of blood or forfeiture of estates, save those of the offender: Maryland, Constitution, 1776, XVI, XXIV; Massachusetts, Constitution, 1780, Part I, XXV; New York, Constitution, 1777, XLI; Pennsylvania, Constitution, 1790, IX, 18, 19; Vermont, Constitution, 1786, Ch. II, par. XVII. See Thorpe, *op. cit. supra*, note 1.

The use of the terms of the Statute of Edward III in the basic treason statutes of almost all the states may now fairly be argued to have an extensive significance that we cannot be so sure of in earlier usage. By 1776–1778 the broad pattern of construction of its phrases by the English courts was complete. We have seen evidence that this learning was familiar to American lawyers at least through the standard treatises, and that the most skilled draftsman of the day used the old statutory terms with intent to take them with at least some of the gloss which English judges had put upon them. The Maryland legislature also made this approach explicit in its Act of April 20, 1777, declaring, after it had adopted the well known language concerning the levying of war and adhering to the enemy, that

> the several crimes aforesaid shall receive the same constructions that have been given to such of the said crimes as are enumerated in the statute of Edward the third, commonly called the statute of treasons."

And none of the state statutes of the Revolution used the sort of negative language which Jefferson, in 1778, or the framers of the Federal Constitution, in 1787, regarded as of critical importance to indicate a cautious hedging about

" Laws of Maryland, *op. cit. supra*, note 33, Act of April 20, 1777 (February, 1777, Sess.), Ch. XX.

of the offense. In a supplementary treason act of October 22, 1779, the New York legislature provided

> That besides the several Matters by the Law of England, declared to be Evidence and Overt Acts of High Treason, in adhering to the King's Enemies; and which are hereby declared to be Evidence and Overt Acts of High Treason, in adhering to the Enemies of the People of this State as Sovereign thereof; the following Matters shall be and are hereby declared to be Evidence and Overt Acts, of adhering to the Enemies of the People of this State * * *[33]

If one looks at the specific categories of conduct condemned as betrayal of the state, the picture is clearly one of a broad effort to safeguard the community with little tenderness for the individual's choices or dissents. Provisions in Pennsylvania, South Carolina and Vermont expressly attacked domestic levy of war in terms reminiscent of the early 17th century acts in the northern colonies.[34] The typical basic treason statutes,

[33] Laws of the State of New York, *op. cit. supra*, note 34, Ch. XXV, p. 85. The penalty was forfeiture of property. The additional acts specified as "adhering to the enemies of the people" were voluntarily withdrawing to British-controlled areas, or breaking paroles and going to or remaining in British-controlled areas.

[34] The Pennsylvania Act of December 3, 1782, Ch. M, 11 Statutes at Large, *op. cit. supra*, note 11, p. 44, recited facts indicating social and economic tension between the settled and propertied eastern portion of the state and the frontier areas, pointing out that despite straitened finances the commonwealth had spent much in defense of the frontier, and that large debts were owed the the late proprie-

it is true, did not undertake to enact *eo nomine* the law of constructive levy of war; but, as as has been suggested, at this late date the fair inference is that the main outlines of English judicial construction of Edward III's statute were intended by those who used its words. The threat of the

taries, to which each county should contribute its share, "and the unlocated lands within this state are, and always have been considered a valuable fund towards paying and discharging the said debt." It then declared it high treason, to be punished by death and forfeiture of all property, if anyone "shall erect or form, or shall endeavor to erect or form any new and independent government within the boundaries of this commonwealth * * *". United States Constitution, IV, 3, (no new state may be created within the territory of an existing state without the consent of the latter) might now be deemed to confirm the authority of a state to regard such an endeavor as treason. Compare the Pennsylvania Act of March 10, 1787, Ch. MCCLXX, 12 *id.* 378 (co-operation with Massachusetts by offering reward for apprehension of Daniel Shays). There appears to be no reported decision under the statute of 1782. See (1895) 15 Crim. Law Mag. 191, 192; *cf.* an exchange of comment, apparently involving this act, in the debate over the Sedition Act of 1798, Annals, 5th Cong., 2d Sess., 2148 and 2149, between Representatives Otis (Mass.) and Gallatin (Pa.).

In South Carolina, see Act of April 11, 1776, No. 1017, 4 Statutes at Large; *op. cit. supra*, note 20, p. 343. Vermont Acts and Laws, 1779, p. 6, interestingly, recognizes the possible difference between disaffection to the organized community and to the particular government at any given time ("* * * shall levy War against the State, or Government thereof * * *"). Vermont Acts and Laws, 1779, p. 73, enacted the old "Invasion, Insurrection, or public Rebellion" clause which had not been seen since the mid-17th century. *Cf.* notes 2–5, *supra*.

external enemy naturally predominates in this period, but the colonial period had left some tradition of the use of the treason offense against domestic disturbance.

We have seen that conspiracy to levy war was expressly included in a number of 17th century colonial statutes, and have suggested that though this language disappears in the 18th century books, it is replaced by the provisions of the Statute of Edward III, including that against compassing the death of the king, under which the English courts managed to bring conspiracies to levy war. The omission of any terms analogous to the "compassing" clause in the 1776–1778 statutes would seem to bar including conspiracy to levy war within their scope. In view of the obviously inexpert character of much state legislation in this period, one may doubt the extent to which this result would actually be in the minds of local legislators, few of whom were likely to approach their problems with the technical skill of Jefferson. In any case, it is noteworthy that in about half of the states, conspiracy to levy war was expressly included in the treason statutes, for the first time since the 1660's, and that related statutes add what in effect are offenses of conspiring to adhere to the enemy, giving him aid and comfort.[*]

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[*] Conspiracy to levy war is included in the basic treason statutes of Massachusetts, New Hampshire, Rhode Island and Vermont, note 33, *supra*. It is stated as one basis for the confiscation of property in the Massachusetts Act of May 1, 1779 (4th Sess., Ch. 49), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 968; and in Rhode Island Acts, October, 1779, p. 24. To be "in any way concerned in forming any Combination, Plot, or Conspiracy, for betray-

Contact with the enemy was the subject of much explicit attention. Some statutes, clearly requiring a showing of specific intent to betray, penalize the conveying of "intelligence" or the holding of "correspondence", "for betraying this State, or the United States, into the Hands or Power of any foreign Enemy".[31] Others penalize the "carrying on a treasonable and treacherous Correspondence" with an enemy.[32] Less clearcut were those acts declaring those persons guilty of treason who were "adherent to * * * the enemies of this State within the same, or to the Enemies of the United

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ing this State, or the United States of America, into the Hands or Power of any foreign Enemy" is declared treason, as a separate offense, in North Carolina, Laws, 1777, 1st Sess., Ch. III, 24 State Records, *op. cit. supra*, note 11, p. 9; Pennsylvania, Act of February 14, 1777, Ch. DCCXL, 9 Statutes at Large, *op. cit. supra*, note 11, p. 45; South Carolina, Act of April 11, 1776, No. 1017, 4 Statutes at Large, *op. cit. supra*, note 20, p. 343; Vermont, Acts and Laws, 1779, p. 6. Conspiracy to deliver to the enemy in war time any vessel belonging to the United States, the state or a subject thereof, was declared a felony to be punished by death in Maryland Act of December 3, 1777, Ch. I, Laws of Maryland, *op. cit. supra*, note 33; and the Pennsylvania Act of September 22, 1780, Ch. CMXV, 10 Statutes at Large, *op. cit. supra*, p. 220, is substantially similar. But *cf.* Connecticut, Acts and Laws (1784), *op. cit. supra*, note 33, p. 66.

[31] See, in note 33, *supra*, the acts of Connecticut, Maryland, North Carolina, Pennsylvania (1777), South Carolina and Vermont; *cf.* Massachusetts, Act of May 1, 1776 (4th Sess., Ch. 21), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 479.

[32] See Connecticut (1784) and Pennsylvania (1777) acts, note 33, *supra*, and Rhode Island, Acts, October, 1775, p. 160.

States * * * giving to * * * them Aid or Comfort, or by giving to * * * them Advice or Intelligence either by Letters, Messages, Words, Signs or Tokens, or in any way whatsoever, or by procuring for, or furnishing to * * * them any Kind of Provisions or Warlike Stores * * *."[33] This language might be interpreted to cover the knowing conveyance of information or supplies, without regard to any showing that the conduct was part of a plot to betray the country. In its context in the basic treason acts of the states concerned, however, and in view of the death penalty attached, such language would probably be construed to require a showing of intent to aid the enemy for the defeat or overthrow of the government. Where the legislatures were content to impose less drastic penalties, however, they quite clearly punished persons for the mere fact of voluntary, unauthorized contact with the enemy. The Maryland Act of April 20, 1777, provided that:

> * * * if any subject or inhabitant of this state, shall write or convey any letter, or send or carry any message, to any person employed in the service of Great-Britain against the United States, or any of them, without the leave of the governor of this state, or some one of the general officers of the army of the United States, or shall knowingly receive or bring any letter or message from any such person, and shall not deliver or communicate the same, as

[33] See New Jersey and North Carolina (1776) acts, note 33, *supra*, and Virginia, Ordinances of the Convention, December, 1775, Ch. VII, 9 Hening, *op. cit. supra*, note 11, p. 401.

soon as conveniently may be, to the governor, or some one of the judges or justices of the peace within this state, and shall be thereof convicted in any county court of this state, such person shall be fined not exceeding one hundred pounds current money, in the discretion of the court."[54]

And the Maryland Act of December 3, 1777, declared that:

> * * * if any subject or inhabitant of this state shall go on board any vessel of war or transport belonging to the enemy, or to their camp, or to any city, town, port or place, within any of the United States, in their possession, without permission in writing from the governor and the council of this state, and if any subject or inhabitant of this state shall receive any protection for himself or property from the enemy, or any one under their authority, such person, on conviction thereof in the general or any county court of this state, shall be fined by the court not exceeding the rate of ten pounds for every hundred pounds of property belonging to such person within this state; and if any person convicted of any of the offences aforesaid shall not have property within this state, valued and rated agreeable to the late assessment act at more

[54] Laws of Maryland, *op. cit. supra*, note 33, Ch. XX. Note that this act singles out as conduct especially dangerous the mere fact of correspondence with one in the service of the enemy. Rhode Island Acts, July 1780 (1st Sess.), p. 15, provided that anyone bringing a letter from or carrying it to a place in possession of the enemy, without previous inspection thereof by the authorities "shall be proceeded against as an Offender."

> than two hundred pounds, the court may fine such person at the rate aforesaid, and also adjudge him to be imprisoned for any term not exceeding one year, or to be whipped not exceeding thirty-nine lashes, or both, in their discretion.[55]

In Massachusetts, the Act of November 8, 1782, provided that:

> * * * any Person, an Inhabitant of this State, voluntarily passing from this or any of the United States of *America*, to any Post or Place within the Continent of *America* in Possession of the Enemy, without Leave obtained from the Legislature of this State, or the Supreme Executive in the Recess of the General Court, such Person shall not afterwards be permitted to return again to this State, without leave first obtained therefor from the Legislature, and shall forfeit all his Estate to the Use of the Commonwealth * * *

and, further, that if such a person returned without authorization he should be transported back to an enemy-controlled area, and if he return a second time, be imprisoned during the war.[56] In two acts of 1775, Rhode Island first imposed a fine up to £500 or imprisonment up to one year, and subsequently decreed death and forfeiture of all property for any of its inhabitants who should act as pilots aboard any British ship or vessel.[57]

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[55] *Id.*, Ch. XX.

[56] Acts and Resolves of Massachusetts (reprinted under Ch. 104, Resolves of 1889) 1782—Ch. 32.

[57] Acts, August, 1775, p. 88; October, 1775, p. 160. See also Massachusetts, Act of May 1, 1776 (4th Sess., Ch. 21). 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 479.

A tightening net of New Jersey legislation aimed at curbing trade with the enemy provides the most interesting legislation imposing severe penalties for contact or attempted contact with the enemy without a showing of a specific intent to betray the state. The Act of October 8, 1778, reciting that "many disaffected Subjects of this State do keep up an Intercourse and Communication with the Subjects or Troops of the King of *Great-Britain*, highly dangerous to the Publick Safety * * *" provided that any one owing allegiance to the state who should be taken on his "Way to the Lines or Encampments, or to any Place in the Possession of the Subjects or Troops" of the King, "with Intent to go into the same without a License, Permission or Passport" previously obtained from the authorities should be fined £50–£1000, or be imprisoned 3–12 months, or suffer such corporal punishment not extending to life or member as the court should deem fit. A fine up to £2000, or imprisonment to 18 months, or such corporal punishment not extending to life or member as the court should appoint were provided for any such person who should "voluntarily go into the Lines or Encampments, or to any Place in the Possession of the Subjects or Troops of the King of *Great-Britain*, without a License, Permission or Passport obtained as aforesaid." This act was many times renewed, and more painful or degrading punishments set

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[*] Acts of Council and Assembly, *op. cit. supra*, note 33, App. No. V. A fine up to £1000 or imprisonment up to 12 months for the first offense, and death for the second, were provided for anyone who, having a pass to enter enemy territory, took with him more provisions than necessary for his

That the broad sweep of the statutes did not require a showing of specific treasonable intent was shown in the extraordinary proviso which a codifying act of June 24, 1782, felt it necessary to include:

> That this Act shall not extend to prevent any commissioned Officer * * * of Troops raised for the Defence of this State, with any Party of Men under his Command, from going into the Lines or Encampments of the Enemy or of their Adherents, or into any Place in their actual Power or Possession, for the Purpose of annoying the Enemy, or of apprehending such Persons as may be found going into or coming out of the said Lines or Places, or of seizing and securing all such Goods, Wares or Merchandize as may be attempted to be conveyed into, or brought out of the said Lines or Places, without legal Permission or Passport first obtained as aforesaid. * * *[1]

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sustenance; and a fine of £500, with the death penalty for a second offense, was set for anyone "who shall send or convey, or be in any Manner aiding or assisting in sending or conveying Provisions or other Necessaries of any Kind into the Lines or Encampments, or into any Place in the Possession of the Subjects or Troops of the King of *Great-Britain*, without being duly authorized as aforesaid." This act was supplemented and amended by Acts of December 11, 1778, Ch. CXXIII; December 25, 1779, Ch. CLXXXIV; December 22, 1780, Ch. CCXXXIV; June 28, 1781, Ch. CCLXXIII; October 6, 1781, Ch. CCLXXXIII; June 24, 1782, Ch. CCCXVII. The death penalty was removed and pillorying, imprisonment, compulsory naval service or banishment substituted by the Act of December 22, 1780, *supra*. The codifying act, of June 24, 1782, *supra*, also removed the death penalty for second offenders, but substituted forfeiture of all property.

[1] Ch. CCCXVII, *op. cit. supra*, note 58.

A long series of legislation was capped by the Act of December 21, 1782. Reciting that the law was still being evaded, this act provided that all cattle found to the southeastward of a specified road "shall be deemed and taken as intended to supply the Enemy, and liable to Seizure and Condemnation", and required permits for the movement of cattle from out of state anywhere through the county of Bergen. Its second section provided that any live stock, provisions or naval stores conveyed or driven towards the enemy lines in specified counties after dark within five miles of any place in enemy control "shall be deemed and taken as intended for the Enemy, and liable to Seizure and Condemnation", together with the equipment used in conveying them, "any Passport or Permission for the same to the contrary notwithstanding." Section 3 stipulated:

> That every Article of Provision or Merchandise, seized in any of the Creeks, Rivers, Bays, Meadows or Upland, in the Counties aforesaid, going towards the Enemy's Lines, or Places aforesaid; and that shall have passed on beyond the Inhabited Dwellinghouses adjoining or nearest to the same, it shall be deemed and construed sufficient Evidence to prove that the same were going to the Enemy, and shall be condemned accordingly.

All of these provisions regarding property forfeiture were then given the most drastic application affecting persons concerned with the movement of the suspect property, by Section 5:

> That * * * if any Person or Persons shall, with Firelocks, or other Weapons of War, be found carrying or conveying, or be

> aiding and assisting in the Conveyance thereof, of any Article or Thing prohibited by this or the above recited act [the codifying act], such Person or Persons shall be declared guilty of Felony, and on Conviction thereof, shall suffer death accordingly.[7]

In addition to the familiar phrases condemning the levying of war or the adhering to the enemy, the state statutes expressly declared treasonable certain rather clear forms of adherence, such as "joining their Armies" or "inlisting or persuading others to inlist for that Purpose", or "furnishing Enemies with Arms or Ammunition, Provision or any other Articles for such their Aid or Comfort", or "wilfully betraying, or voluntarily yielding or delivering any vessel belonging to this State or the United States to the Enemies of the United States of America". Likewise, the statutes punished as traitors those who

> have joined, or shall hereafter join the Enemies of this State, or put themselves under the Power and Protection of the said Enemies, who shall come into this State and rob or plunder any Person or Persons of their Goods and Effects, or shall burn any Dwelling House or other Building, or be aiding or assisting therein * * *

or such persons as maliciously, "with an intention to obstruct the service", dissuade others from enlisting in the army or navy of the United States, or with like malice

> spread such false Rumours concerning the *American* Forces, or the Forces of the Enemy, as will tend to alienate the Affec-

[7] *Op. cit. supra*, note 58.

> tions of the People from the Government, or to terrify or discourage the good Subjects of this State, or to dispose them to favour the Pretensions of the Enemy
> * * *

or those who "shall take a Commission or Commissions from the King of Great Britain, or any under his Authority, or other the Enemies of this State, or the United States of America".[81] These types of provision do not represent notable extensions of the general categories of treason, and, indeed, to the contrary, it has been suggested that the Pennsylvania Act of February 11, 1777, which tacks such specifications of treasonable acts onto the traditional provision against adherence to the enemy thereby implies an intention to limit the scope of that offense. Connecticut, North Carolina, and Vermont enacted similarly phrased statutes; obviously three of these were copies, though the evidence does not show clearly which was the original. However, of the other states, nine passed basic treason acts containing the familiar, broad adherence clause without limiting specifications; and Connecticut also had such an act on its books, enacted after its more limited statute and apparently not repealed by any of the reenactments of the more limited statute. The Pennsylvania-type act cannot, thus, be taken as representative of the basic treason legislation in the revolutionary period. Moreover, such restrictive argument as may be drawn from its phrasing, viewed in isolation, carries little conviction as evidence of a prevailing climate of policy when that

[81] Numerous examples of these various phrasings will be found in the statutes cited in note 33, *supra*.

statute is put in the context of the severe test oath legislation, sedition and confiscation acts and like measures which stud the revolutionary statute books in all of the states. The abundance of such enactments suggests that legislative attention was at this time directed with overwhelming urgency towards the security of the new governments.[62]

[62] The restrictive argument is drawn from the phrasing of the Pennsylvania act in the brief of the defendant on reargument in *United States* v. *Cramer* (U. S. Sup. Ct., October Term, 1944), in the thesis that the specifications of treasonable acts indicated an intention to limit the crime to accomplished aid and comfort, barring as "treason" anything which might be deemed merely an attempt. The statute's terms offer some support to this argument [*Cf. Respublica* v. *Roberts*, 1 Dall. 39, 1 L. Ed. 27 (Pa. 1778)] but, as is suggested in the text, not with any great weight when the act is viewed in relation to the general legislative history of the time. Indeed, the preamble of the Pennsylvania statute itself bears witness to the prevailing temper, when it justifies the act by a broad assertion of the need for preventing danger to the state:

> Whereas it is absolutely necessary for the safety of every state to prevent as much as possible all treasonable and dangerous practices that may be carried on by the internal enemies thereof and to provide punishments in some degree adequate thereto, in order to deter all persons from the perpetration of such horried and dangerous crimes * * *

Similar acts are Connecticut Acts and Laws (1784), p. 251, North Carolina, Laws, 1777 (1st Sess.) Ch. III and (2d Sess.) Ch. VI, and Vermont Acts and Laws, 1779, p. 6, cited note 33, *supra*. The familiar, general clause on adherence to enemies is contained in Connecticut Acts and Laws, (1781), p. 502, and in the basic treason statutes of Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Virginia, while a substantially similar clause forms a part of the funda-

Less clearcut, perhaps, are the New Jersey acts of December 11, 1778, and October 3, 1782, which declared that those who had "voluntarily

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mental treason act of South Carolina. See note 33, *supra*. In practically every one of these states there are additional provisions, spelling out what amount to acts of aid and comfort; but these are not so framed as to suggest any limitation on the general provision. The Ordinance of December 23, 1776 in North Carolina, and the act of September 5, 1776, in Pennsylvania, contained the general adherence clause; but these acts would probably be deemed repealed by implication by the subsequent statutes. (See note 33, *supra*.) The Massachusetts act of May 1, 1776 (4th Sess., Ch. 22) is somewhat similar to the Pennsylvania act of February 11, 1777; but is complemented, if not repealed, by the act of February 1, 1777 (3d Sess., Ch. 32), following the model suggested by the Continental Congress.

One might argue that the fact that in some of these cases the legislatures provided penalties much less severe than the sentence of death and forfeiture of estate familiar in high treason, suggests that the legislators were in practice indicating a policy restricting the offense of "high treason" by creating lesser felonies and even misdemeanors for conduct which might have been subjected to the harsher punishments. However, many of these acts explicitly treat the offenses as "treason" or betrayal, and there seems no authority that the severity of punishment is the criterion of what is "treason," the essence of which seems to consist in a betrayal of allegiance. The provision of the United States Constitution, conferring on Congress the authority to fix the penalty in treason, within the limitations there set, implies that it is not the severity of penalty which defines the offense.

A narrower argument restrictive of the scope of the crime might be drawn from the Massachusetts Act of February 1, 1777, (3d Sess., Ch. 32), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 615; and Rhode Island, Acts, May, 1777 (2d Sess.), p. 30, which provide that "concealment or keeping secret, of any treason, be deemed and

gone to, taken Refuge or continued with, or endeavoured to continue with the Enemy aforesaid, and aid them by Counsel or otherwise" were guilty of high treason, and fixed penalties of forfeiture of estate and death.[63] "Aid by Counsel" might be the same as conveying intelligence of military value, but the phrase was not necessarily that narrow and might include a wide range of dealing or conferring. Whatever be thought of this, the concept of treasonable adherence to the enemy was certainly given an extremely sweeping application in the legislation which imposed penalties ranging from heavy fines or jail sentences to the death sentence and complete forfeiture of property for the mere utterance of opinions denying the independent authority of the new states and asserting the continued sovereignty of the King. Typical of these acts was that passed as late as March 30, 1781, by New York:

> WHEREAS, altho' adhering to the Enemies of this State, is by Law, High Treason against the People of this State; yet in Order more effectually to prevent an Adherence to the King of Great Britain, it is deemed requisite that farther Provision should be made by law;

taken *only* misprision of treason." (Emphasis supplied). The result of this negative language is apparently that what otherwise might well be treated as a form of treason by giving aid or comfort to the enemy must be prosecuted as the lesser offense. However, in all the other states, the crime of misprision is created without the use of such restrictive words, so that discretion is apparently left to the prosecutor as to the severity of the penalty which he might seek in a case of concealment.

[63] Acts of Council and Assembly, *op. cit. supra*, note 33.

Be it therefore enacted * * * That if any Person being a Citizen or Subject of this State, or of any of the United States of America, and abiding or residing within this State, shall maliciously, advisedly and directly, by preaching, teaching, speaking, writing, or printing, declare or maintain, that the King of Great Britain hath, or of Right ought to have, any Authority, or Dominion, in or over this State, or the Inhabitants thereof, or shall maliciously and advisedly seduce or persuade, or attempt to persuade or seduce any Inhabitant of this State, to renounce his or her Allegiance to this State, or to acknowledge Allegiance or Subjection to the King or Crown of Great Britain, or shall maliciously and advisedly declare or affirm, that he or she doth owe Allegiance to the King or Crown of Great Britain, and be convicted thereof, shall be adjudged guilty of Felony, and shall suffer the Pains and Penalties prescribed by Law in Cases of Felony without Benefit of Clergy. * * *

Provided, nevertheless, That it shall and may be lawful for the Court before whom such Offender shall be convicted, if such Court shall deem it proper, instead of giving Judgment of Death, to order and direct that such Offender shall be sent, as soon as conveniently may be, to serve for the Term of three Years, on board of any Ship of War, belonging to this State, or to the United States, or to an Ally of the United States; and if any Offender so ordered by any such Court, to be sent to serve on board any such Ship of War for the Term aforesaid, shall desert from such Service and be found within this State, or any other of the United States, the Person so desert-

> ing shall be liable to be punished as a Person attainted of Felony without Benefit of Clergy, * * *[61]

This type of legislation obviously breathes the spirit of hot partisanship, but the New York act is particularly interesting because it suggests that there may have been something more than sheer emotion behind so drastic a punishment of the mere expression of a political allegiance. The preamble emphasizes the need more effectually to prevent persons adhering to the enemy. In other words, the requisite overt act may be defined as conduct possibly many steps removed from an immediate threat to the state where the offending conduct is regarded as creating dangerously fertile ground for the commission of more tangible acts of betrayal. That the mere utterance of a political opinion is being penalized in these cases becomes even clearer in a statute such as that in Virginia, which declared the utterance of the opinion, or action upon it, to be equally offensive, providing a fine not exceeding £20.000 and imprisonment not exceeding five years

> * * * if any person residing or being within this commonwealth shall * * * by any word, open deed, or act, advisedly and willingly maintain and defend the authority, jurisdiction, or power, of the king or parliament of Great Britain, heretofore claimed and exercised within this colony,

[61] 1781. (4th Sess.), Ch. XLVIII, Laws of the State of New York, *op. cit. supra*, note 34, p. 189. Equally severe are Connecticut Acts and Laws, (1781), p. 569; and New Hampshire, Act of April 6, 1781, 4 Laws of New Hampshire, *op. cit. supra*, note 5, p. 384.

or shall attribute any such authority, jurisdiction, or power, to the king or parliament of Great Britain.[55]

Apart from their *prima facie* meaning, the terms of such statutes are obviously capable of being applied to sweep in all manner of incautious political talk in a time of stress. The readiness displayed to put the offense of treason to liberal use for the security of the new states is comparable to any but the most extreme instances of extension of the crime by statute or construction in England.

The broad extent of "treason" during the Revolution is demonstrated, finally, in the severe acts imposing forfeiture of estate, banishment, or, in some circumstances, the death penalty, upon persons who had withdrawn to enemy-controlled areas after the beginning of hostilities. In later

[55] Laws, October, 1776, Ch. V, 9 Hening, *op. cit. supra*, note 11, p. 170. The bulk of this type of legislation imposed penalties of fine, imprisonment, or civil disabilities. Connecticut: Acts and Laws (1781) p. 569 (alternative penalty). New Hampshire, Act of April 6, 1781, note 54, *supra* (alternative penalty). Rhode Island: Acts, July, 1776, p. 133. Virginia: Laws, May, 1780, Ch. XIV, 10 Hening, *op. cit. supra*, p. 268. See also the acts of Delaware (1777), Maryland (1777), New Jersey (1776), and North Carolina (1776), cited in note 33, *supra*. Compare the usual test oath acts, imposing penalties for refusal to swear, ranging from banishment to civil disabilities: *e. g.*, Delaware, Act of May 18, 1778; Maryland, Act of December 3, 1777, The Laws of Maryland, *op. cit. supra*, note 33, *supra*, Ch. XX; New Jersey, Act of June 5, 1777, Acts of Council and Assembly, *op. cit. supra*, note 33, Ch. XXXIII; Virginia, Laws, May, 1777, Ch. III, 9 Hening, *op. cit. supra*, p. 281.

and calmer years, judges looking with obvious disfavor on this harsh legislation and eager to apply strict construction to limit the extent of forfeitures thereunder, denied that these were "treason" acts. Those who left the newly independent states for British territory had not hitherto owed allegiance to the states, since the states had not previously existed as independent entities to claim allegiance. Those who withdrew were simply exercising a right recognized in international law to choose the country of their abode; and the states which took their property were simply exercising the basic right of any sovereign to determine the conditions on which "aliens" might hold property within his domain.[88] The theory found some contemporary expression, as in the Rhode Island Act of October, 1779, which declared that a person who had withdrawn to British controlled areas and had not returned and been received as a subject in the state,

> shall be held, taken, deemed and judged to have voluntarily renounced all civil and political relation to each and every of the

[88] See *Inglis* v. *Trustees of the Sailor's Snug Harbour*, 3 Pet. 99, 121, 168, 7 L. Ed. 617, 625, 641 (U. S. 1830); Dana, C. J., in *Martin* v. *Commonwealth*, 1 Mass. 347, 397 (1805); Sedgwick, J., *id.*, 384; Kent, Ch. J., in *Jackson* v. *Catlin*, 2 Johns. 248, 260 (N. Y. 1807); *Mongin* v. *Baker and Stevens*, 1 Bay 73 (So. C. 1789); *Wells* v. *Martin*, 2 Bay 20 (So. C. 1796); *cf. Collins* v. *Kincaid*, 2 Bay 536 (So. C. 1804). But *cf. Cooper* v. *Telfair*, 4 Dall. 14, 18, 19, 1 L. Ed. 721, 722 (U. S. 1800); Richardson, C. J., in *Thompson* v. *Carr*, 5 N. H. 510, 515 (1831); argument of counsel, in *M'Neil* v. *Bright*, 4 Mass. 282, 297 (1808); *Camp* v. *Lockwood*, 1 Dallas 393, 1 L. Ed. 193 (Pa. 1788).

said United States, and be considered as an Alien.

But even in this Act, the preamble's recital of the state's grievance against its former residents indicates that the taking of property under the act was viewed as a penal action rather than a colorless exercise of sovereign authority to define property rights. It was there asserted that:

> * * * all countries have a Right to the personal Services of its [sic] Inhabitants, the greatest Exertions of whom, in their different Capacities, are especially requisite for the Defence and Protection of their Lives, Liberties and Properties, during the actual Invasion of Enemies; and a Refusal or withdrawing the same being against the Rights of human Society, and the being voluntarily adherent to public Enemies, by giving them Aid or Comfort, or the seeking of their Protection, amount to a total Renunciation of all former Rights, Privileges and Inheritances whatever: And whereas * * * sundry of said Inhabitants, regardless of their Ties, and Obligations aforesaid, have left their Habitations, joined and been adherent to the Enemies aforesaid, thereby giving them Aid and Comfort, or continued to reside in Places invaded by or in the Power of said Enemies, and have voluntarily aided or abetted them. * * *

And the New Jersey Act of December 11, 1778, did not hesitate to declare "treason" to be the basis for the confiscation it ordained:

> * * * each and every Inhabitant of this State, seized or possessed of, interested in,

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Acts, 1779, p. 24.

or entitled unto, any Estate Real or Personal within the same, who hath since * * * [April 19, 1775, and before October 4, 1776] * * * aided and assisted the Enemies thereof, or of the United States, by joining their Armies within this State, or elsewhere, or who hath voluntarily gone to, taken Refuge or continued with, or endeavoured to continue with the Enemy aforesaid, and aid them by Counsel or otherwise, and who hath not since returned and become a Subject in Allegiance to the present Government, by taking the Oaths or Affirmations prescribed in the Act * * * [of September 19, 1776] * * * when required, each and every such Person is hereby declared to be guilty of High Treason against this State; and on Conviction thereof by Inquisition found and * * * final Judgment thereon entered in Favour of the State, as herein after is declared, such Conviction shall amount to a full and absolute Forfeiture of such Person's Estate, both Real and Personal whatsoever within this State, to and for the Use and Benefit of the same: Provided always, That such Conviction shall not extend to affect the Person of any such Offender, but shall operate against his or her Estate only * * *[68]

[68] Acts of Council and Assembly, *op. cit. supra*, note 33, Ch. CXXII. See *Kemp* v. *Kennedy*, Fed. Cas. #7686 (Circ. Ct. D. N. J. 1808), 5 Cranch 173, 3 L. Ed. 70 (U. S. 1809). The New Jersey act is not the less significant because it limits its penalties to those who had not merely withdrawn, but had also aided the "enemy", since such aid would not be "treason" unless given by one whom the state regarded as owing it allegiance.

Viewed in the history of the times, and, more particularly, in the context of other legislation abounding in the same statute books, it is clear that the Rhode Island preamble and the New Jersey declaration expressed the practical animus behind the confiscatory acts.

A few of the confiscation acts made the taking depend on a finding that the former owner had actively aided the enemy, in addition to withdrawing to the enemy's territory.[9] Other banishing or confiscatory provisions are ambiguous, reciting that the action is based on the fact that the former owner has "joined" the enemy.[10] But another class of statute, including about as many as

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[9] Massachusetts: Act of April 30, 1779 (9th Sess., Ch. 48), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 966. New Jersey: Act of December 11, 1778, note 68, *supra*. New York: Act of October 22, 1779, Laws of the State of New-York, *op. cit. supra*, note 34, p. 85. Pennsylvania: Act of March 6, 1778, Ch. DCCLXXXIV, 9 Statutes at Large, *op. cit. supra*, note 11, p. 201. South Carolina: Act of February 26, 1782, No. 1155, 4 Statutes at Large, *op. cit. supra*, note 20, p. 523.

[10] Massachusetts: Act of October 16, 1778 (2d Sess., Ch. 24), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 912; *cf.* Act of May 10, 1777 (9th Sess., Ch. 48), *id.* 648. New Hampshire: Act of November 10, 1778, Acts and Laws, *op. cit. supra*, note 33. New Jersey: Act of December 11, 1778, Acts of Council and Assembly, *op. cit. supra*, note 33, Ch. CXXII; Act of October 3, 1782, Ch. CCCXVIII, *id.*; see *Kemp* v. *Kennedy*, note 68, *supra*. North Carolina: Laws, 1777, (2d Sess.) Ch. XVII, 24 State Records, *op. cit. supra*, note 11, p. 123. South Carolina: Act of March 17, 1783, No. 1189, 4 Statutes at Large, *op. cit. supra*, note 20, p. 568. Quaere, regarding Rhode Island: Acts, October 1779, p. 24, note 67, *supra*. *Cf.* New York:

the two previous classes together, stated as at least an alternative basis for confiscation, the mere finding that the former owner had in fact withdrawn to territory in enemy control, or had remained in an area which the enemy took over, or, being absent in English territory when hostilities began, had not returned. So far as this provision in these acts was concerned, there was no need to show any further overt act of aid or comfort to the enemy, nor any specific intent to betray the

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Act of May 12, 1784, Ch. LXVI, *op. cit. supra*, note 34, and Laws of the State of New York (1778–1789) (Published according to Act of legislature. Jones and Varick., N. Y. 1789) (misprision). The New York Council of Revision objected to this last act in an opinion of the same date:

> Because by the first enacting clause, the voluntarily remaining with the fleets and armies of the King of *Great Britain* is made an offence highly penal; whereas by the known laws of all nations, persons who remain with their possessions when the country is over-run by a conquering army, are at least excused, if not justified; and should our laws be made to retrospect in a manner so directly contrary to the received opinions of all civilized nations, and even the known principles of common justice, it will be highly derogatory to the honor of the state, and fill the minds of our fellow citizens with the apprehension of suffering in future some heavy punishment for that conduct which at present is perfectly innocent.

See Street, The Council of Revision of the State of New York (Albany, 1859), 254; Law of the Legislature of the State of New York in Force Against the Loyalists etc. (London: Printed by H. Reynell, 1786) App. No. 2, p. 171. The law was enacted, however, notwithstanding the Council's objection. *Cf.* Street, *op. cit. supra*, pp. 219, 246.

state.[1] Later judges evidently so interpreted the scope of these statutes.[2] That this interpretation is not out of line with the temper of opinion in which this sort of legislation was being passed is indicated by the history of one part of the New York confiscation acts.[3] The Act of October 9, 1780, imposed a tax upon any person whose minor son had joined the enemy since the Declaration of Independence, if the son at the time of joining the enemy was resident with his parents, and had not since returned voluntarily to reside in some part of the state not under enemy control. Being thus bluntly put, the act apparently imposed the tax regardless of any cooperating treasonable intent on the part of the parent. It might have been argued that such an intent element was supplied by a presumption of parental control of a minor son's actions in these circumstances. That any element of treasonable intent on the part of the parent was in fact omitted in the early statute was evidenced, however, by the Act of March 15,

[1] Maryland: Act of April 20, 1777, note 33, *supra*; Act of February 2, 1781, Laws of Maryland, *op. cit. supra*, note 33. Massachusetts: Act of May 1, 1779 (4th Sess., Ch. 49); 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 968. New Hampshire: Act of March 28, 1782, 4 Laws of New Hampshire, *op. cit. supra*, note 5, p. 456. New York: Act of October 22, 1779, Ch. XXV, Laws of the State of New York, *op. cit. supra*, note 34, p. 85; *cf.* Act of July 1, 1780, Ch. LXXVI, *id.* 143; and acts cited in note 73, *infra*. North Carolina: Laws, 1777 (2d Sess.), Ch. XVII, note 70, *supra*. Rhode Island: Acts, Oct. 1779, p. 24. South Carolina: Act of February 26, 1782, No. 1153, note 69, *supra*.

[2] See opinions cited in note 66, *supra*.

1781, which, reciting that sons of parents themselves loyal to the American cause may have gone over to the enemy without parental knowledge or consent, provided opportunity for the parent to appear and show that the tax was thus unjustly levied on him.[3]

Severe as were most of the foregoing acts, they yet dealt out only banishment or forfeiture of property. There were in several states, however, statutes which reinforced initial judgments of banishment, based on withdrawal to enemy-controlled areas or refusal to swear allegiance to the state, by providing the death penalty if the individual should thereafter be found within the state.[4]

The analysis of the scope of the offense of treason during the Revolutionary period began by pointing out that, in contrast to the colonial era, there were some significant signs of the growth of an opinion that "treason" must be more carefully defined and limited. Taken in the context of the period as a whole, however, this note of

[3] Chs. XIV, 1780, and XXVIII, 1781, Laws of the State of New-York, *op. cit. supra*, note 34, pp. 160, 176.

[4] Massachusetts: Act of October 16, 1778 (2d Sess., Ch. 24), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 912. New Hampshire: Act of November 19, 1778, *loc. cit.*, note 70, *supra*. North Carolina: Laws, 1777 (1st Sess.) Ch. III and (2d Sess.) Ch. VI, 24 State Records, *op. cit. supra*, note 11, pp. 9, 84. Rhode Island: Acts, July 1780 (1st Sess.), p. 19. South Carolina: Act of February 15, 1777, No. 1051, 1 Statutes at Large, *op. cit. supra*, note 20, p. 135; 4 *id.* 392; Act of March 28, 1778, No. 1079, 1 *id.* 147, 4 *id.* 424; Act of October 9, 1778, No. 1101, 4 *id.* 450. Vermont: Acts and Laws, 1779, p. 71.

skepticism was still subordinate to a broad [and impulsive] use of "treason" as the means by which to ward off what were viewed as extreme dangers to the security of the states.

There is little to be said regarding the procedural incidents of treason trials as set out in the laws of the Revolutionary period. Almost all the basic treason acts either required "the testimony of two lawful and credible witnesses" (without linking this to the proof of overt acts), or in substance adopted the language of the Act of 7 William III.[*] There is no innovation, and certainly no hint of the type of two-witness requirement later inserted in the United States Constitution. Where provisions regarding the quantum of proof were omitted—which was especially true of acts creating supplementary and novel definitions of treasonable offenses—the obviously haphazard quality of legislative drafting makes it seem more likely due to inadvertence than to policy.[**]

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[*] See statutes cited in note 33, *supra*.

[**] The 1776 acts in Connecticut, North Carolina, Pennsylvania and South Carolina, note 33, *supra*, lacked two-witness clauses. That this was due to inadvertence rather than a judgment of policy is suggested by the appearance of such clauses in the more carefully fashioned acts of 1777 in North Carolina and Pennsylvania. Two-witness provisions were included in some of the legislation setting forth novel or supplementary definitions of treasonable offenses. See, *e. g.*, the disloyal utterances provisions of Delaware Act of February 22, 1777, North Carolina, Laws, 1777, Ch. III, and Pennsylvania Act of February 11, 1777, Ch. DCCXL, note 33, *supra*. *Cf.* Maryland Act of December 3, 1777, Laws of Maryland, *op. cit. supra*, note 33, Ch. XX (misprision).

(c) *The Constitution*

(1) General Policy

Grievances over oppressive prosecutions for treason or other offenses did not form one of the causes which brought the Federal Convention together in 1787. But once the outlines of a really strong government were sketched, the political liberalism which marked this conservative body made it logical to consider necessary curbs upon abuse of the new power created. The basic policy of the treason clause written into the Constitution emerges from all the evidence available as a restrictive one. Everyone took for granted that, since a new sovereign was being created, its authority must be given protection. The matter which dominated all references to the subject, however, was not the establishment of this protection, but its careful limitation to the minimum necessary to safeguard the community.

This restrictive emphasis stands out with special sharpness, because the story begins on a more positive note. In the summer of 1786 there were stirrings in the Continental Congress looking towards amendments to strengthen the Articles of Confederation. On August 7, 1786, a committee named in July to report amendments, brought forth several proposals, of which Charles Pinckney was apparently the principal author. Article 19 of these amendments proposed to grant to Congress the sole and exclusive power of defining and punishing treason.[1] No limitations

[1] 31 Journals of the Continental Congress, *op. cit. supra*, note 31, p. 497; Burnett, The Continental Congress (N. Y. 1941) 664.

were suggested. The other fact which provides background for the story of the treason clause occurred in the autumn of 1786 when mobs of western Massachusetts farmers, taking Daniel Shays for their leader, resorted to force to halt the debt proceedings and mortgage foreclosures against which they had so far fruitlessly sought legislative relief. Shays' Rebellion sent a shudder of shocked alarm through moderate and conservative elements in the country at large, the Continental Congress took secret measures to provide Federal troops to support the energetic action of the Massachusetts executive and militia in successful suppression of the outbreak, and additional, powerful impetus was given the movement for creating a stronger central government. Records of the Continental Congress, of the Federal Convention and of the debate over ratification of the Constitution furnish ample evidence of how vividly the threat of Shays' Rebellion was in the minds of proponents of the new government. The Constitution contained specific authorization and means for the central government to support or initiate action against further insurrection.[1]

[1] Massachusetts legislation and executive pronouncements declared the rebellion to be "treason." See, in Acts and Resolves of Massachusetts, *op. cit. supra*, note 56, the Acts of February 16 and 26, 1787 (1786, Chs. 56 and 59) pp. 176, 187; Resolves of February 4, March 10, and June 15, 1787, and June 10 and 19, 1788, *id.*: 428, 515, 677, 857; Governor's Messages of September 28, 1786 and February 3, 1787, *id.*, 928, 960. See 32 and 33 Journals of the Continental Congress, *op. cit. supra*, note 31, (1787) pp. 24, 38–39, 85, 93–105, 110–111, 176n, 719–722, 724, 729; and numerous letters cited under heading "Shays' Rebellion" in 8 Burnett, Letters, *op. cit. supra*, note 37. Compare Con-

With positive provision for the safety of the state thus to the fore in Congressional proposals for changing the frame of government, and the example of Massachusetts strong in the minds of men looking for assurances of orderly and secure economic and social development, the limitations of the treason clause must reflect deeply held notions of individual security against official oppression.[79]

gressional reactions to the mutiny of the soldiers demanding back pay, in Philadelphia, 1783. 5 Elliott, Debates in the Several State Conventions on the Adoption of the Federal Constitution (2d ed. Washington, 1854) 66, 92, 93; *cf.* 7 Burnett, *op. cit. supra*, p. 499. Regarding the Congressional provision of troops to support Massachusetts, see 5 Elliott, *op. cit. supra*, 94–95, 99; *cf. id.* 108. As to the influence of the rebellion on the movement for the Constitution, see The Federalist (Lodge ed. N. Y. 1908) Nos. XXV and LXXIV (Hamilton) and XLIII (Madison); 3 Elliott, *op. cit. supra*, pp. 82, 101, 180, 274 (Virginia Convention); 4 *id.* 20, 96, 112, 220 (North Carolina) 282 and 327 (South Carolina). See U. S. Const., I, 8 and 9 and IV, 4.

[79] On the eve of the Federal Convention, the New York Act of February 16, 1787 (10th Sess. Ch. XXIX, 2 Laws of the State of New York (1778–1789) (Published according to Act of legislature. Jones and Varick. Printed by Hugh Gaine, New York, 1789) 55, declared:

> That if any Person do levy War against the People of this State, within this State, or be adherent to the Enemies of the People of this State, or of the United States of *America*, within this State, giving to them Aid and Comfort in this State, or elsewhere, and be thereof, by good Proof, attainted of open Deed, such Offences, and none other, shall be adjudged Treason against the People of the State of *New-York*.

A two-witness requirement in the terms of the Statute of 7 William III was also provided. The declaration that

The positive emphasis is still apparent at the beginning of the Convention. The Pinckney plan for the new government, defining the powers of the federal legislature in terms obviously drawn from the 1786 proposals to the Continental Congress, provided

> 15. S. & H. D. in C. ass. shall institute Offices and appoint Officers for the Depart-

"none other" than the two named offenses should constitute treason was without precedent in state treason legislation. No clue to the origin of this language has been found in the available records of the legislature. (See Journal of the Assembly, 10th Sess., 1787, pp. 9, 10, 14, 38, 40, 41, 45, 50, 54; Journal of the Senate, *id.*, 24, 25, 27, 29, 33; a further check of records available in Albany, made through the courtesy of Miss Frances D. Lyon, Law Librarian of the New York State Library, revealed no additional information), nor is there evidence that the act came to the attention of the Federal Convention. The Journal of the New York Assembly for the 10th Session, 1787, p. 9, notes that the bill which became the Act of February 16, 1787, was laid before the house by Mr. Jones, pursuant to the law for revising the laws of the state. Previously, the Journal notes, (p. 5), it had been "Ordered that Mr. [Alexander] Hamilton, Mr. [Samuel] Jones, Mr. [John] Ray, Mr. J. [John] Livingston, Mr. C. [Caleb] Smith, or any 3 or more of them, be a Committee to inspect what laws are expired, or near expiring, and that they, from time to time report to the House which of them they judge necessary to be revived or continued, and likewise what new laws they shall conceive necessary to be made for the benefit of the State." There is no evidence that Hamilton urged a restrictive policy on "treason" in the Philadelphia Convention, though in *The Federalist*, he cites the treason clause as one item to answer the criticism that the Constitution lacked a proper bill of rights. See note 96, *infra*.

ments of for. Affairs, War, Treasury and Admiralty—

They shall have the exclusive Power of declaring what shall be Treason and Misp. of Treason agt. U. S. * * *[80]

Hamilton's plan of government, apparently leaving the creation of treasonable offenses to general powers conferred on the central government, provided that the Executive should have power to pardon in cases of treason only with the approbation of the Senate. Both the Executive and Senate, holding office during good behaviour, were a step removed from the electorate, which was to choose the Electors who would select Senators and a "Governour". It is not surprising that Hamilton's only reference to treason should seek to enforce a strong hand against disaffected persons.[81]

The first evidence of concern to set limits to the offense is in a draft of the "New Jersey Resolutions." Paterson's notebook includes a Resolution

that it is necessary to define what offences, committed in any State, shall be deemed high treason against the United States.

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[80] 2 Farrand, ed., The Records of the Federal Convention of 1787 (New Haven, 1937) 136. This is from the document which Farrand accepts as the best evidence of Pinckney's plan. In the version which Pinckney sent John Quincy Adams, in December, 1818, when the latter was preparing the Journal of the Convention for publication, the treasons section is similar to that in the Constitution. 3 *id.* 598, 608. Since the general emphasis of the Pinckney plan seems to be on defining the federal relationship, it is likely that the grant of "exclusive" power to declare treasons was intended to exclude state legislative power, rather than to distinguish legislative-made from judge-made law.

[81] 1 *id.* 292. Through, *cf.* note 96, *infra*.

This proposal is crossed out, in Paterson's record book, and is not included in Madison's report of the New Jersey plan."[2] In any event, its place in a body of "small state" resolutions suggests that delimitation of central government as compared to state authority, rather than protection of individual liberty, was the moving force; and this hypothesis is consistent with the lengthy discussion in the Convention over the relative boundaries of federal and state definition of treasons. On the policy of protecting the individual, there was no small state-large state division in the Convention, and, indeed, some of the most vigorous advocacy of limitations was by Virginia delegates.

Save for these references in papers laid before the Convention, there was no mention of "treason" until the Committee of Detail submitted its draft Constitution to the Convention in August, 1787. The treason clause was the creation of this Committee. No specific instructions on the subject were included in the resolutions sent to the Committee, and its authority to deal with the matter must be derived from the omnibus resolution providing that the "national legislature" be empowered "to legislate in all cases to which the separate States are incompetent."[3]

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[2] *Id.* 242-245. The resolution on treason, crossed out in Paterson's notebook, appeared in the copy of these resolutions printed February 15, 1788 in the Maryland Gazette and Baltimore Advertiser. Farrand thinks it "altogether probable" that the printer obtained the document from Luther Martin, who had stated in his *Genuine Information* that he had a copy of the New Jersey plan. 3 *id.* 614.

[3] See 2 Curtis, History of the Constitution of the United States, (N. Y. 1861) 384; Meigs, Growth of the Constitu-

In this, as in most other matters, we have little direct evidence of the deliberations of Ellsworth (Connecticut), Gorham (Massachusetts), Randolph (Virginia), Rutledge (South Carolina), and Wilson (Pennsylvania), in the Committee of Detail. What we have, however, marks the beginning of concentration on limiting the scope of the offense. A draft in Wilson's handwriting contains the simple authorization of the Pinckney plan, to Congress "to declare what shall be Treason against the United States", with the addition, in Rutledge's hand, of the limitation of the punishment, "not to work Corruption of Blood or Forfeit except during the Life of the Party." However, a document in the handwriting of Randolph, (with each item checked or crossed out, indicating use of the paper in preparation of subsequent drafts), narrows the definition of legislative power to the authority "To declare it to be treason to levy war against, or adhere to the enemies of the U. S." And in the draft Constitution reported by the Committee, August 6, 1787, Article VII, Section 2 provided that

> Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testi-

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tion (Philadelphia, 1902) 252-254. Farrand, The Framing of the Constitution of the United States, (New Haven, 1913) 48, advances the suggestion of the source of the committee's authority to draft the treason clause.

> mony of two witnesses. 'No attainder of treason shall work corruption of blood nor forfeiture, except during the life of the person attainted."[2]

At one stroke, the basis of the restrictive policy has now been laid: all authority is taken from any other agency, to define the extent of the crime; the decision is taken that there shall be no analogy to the ancient offense of compassing the king's death; a stipulation on quantum of proof is given constitutional sanction. But, the language on adherence is not qualified by the traditional "aid or comfort" phrase, nor is there explicit recognition of the overt act as an element of the offense, and of course, therefore, no linking of the two-witness requirement to the overt act. Acts of treason against a state are made treason against the United States, a provision finally eliminated.

The treason clause was discussed at some length by the Convention, in Committee of the Whole, August 20, 1787, in a debate which serves to underline the framers' preoccupation with limiting the scope of the crime. This is apparent, in the first place, from the discussion of the general terms of the clause. Surprisingly, Mr. Madison opened the discussion with a plea for less restrictive language:

> Mr. Madison thought the definition too narrow. It did not appear to go as far as the Stat. of Edwd. III. He did not see why more latitude might not be left to the Legislature. It wd. be as safe as in the hands of State legislatures; and it was incon-

[2] 2 Farrand, *op. cit. supra*, note 80, pp. 144, 168, 182; 4 *id.* 45.

venient to bar a discretion which experience might enlighten, and which might be applied to good purposes as well as be abused.[85]

Mr. Mason, on the other hand, was in favor of following the language of the Statute of Edward III. That he believed the old terms were valuable to limit the definition of the crime is suggested by the fact that later in the discussion he moved to add to the clause concerning adherence to the enemy the familiar terms of aid and comfort,—"as restrictive of 'adhering to their Enemies &c'—

[85] Unless otherwise noted, all of the following incidents of the discussion of August 20 will be found in 2 Farrand, *op. cit. supra*, note 80, pp. 345–350.

Note that Madison's argument bears out the conclusion reached in the examination of the colonial and state materials, that no notable legacy of protest against abuse of treason prosecutions had resulted. Compare Madison's strictures on the too limited character of the offense as framed with his comments in a letter of October 18, 1787, to Washington, regarding Mason's objections to the Constitution. 3 *id.* 130; 5 Writings of James Madison (Hunt, ed. N. Y. 1904) 11, 13. Madison declares that it is proper, Mason's criticism to the contrary notwithstanding, that the Constitution does not "secure" the common law:

> Since the Revolution every State has made great inroads & with great propriety in many instances on this *monarchical* code. * * * What could the Convention have done? If they had in general terms declared the Common law to be in force, they would have broken in upon the legal Code of every State in the most material points; they w^d have done more, they would have brought over from G. B. a thousand heterogeneous & antirepublican doctrines, and even the *ecclesiastical Hierarchy* itself, for that is a part of the Common law. * * *

the latter he thought would be otherwise too indefinite—". Further discussion over the extent to which the Committee of Detail had enlarged or narrowed the scope of the language of Edward III's statute shows that the old English law was at least prominently in the minds of the Convention.

In the midst of the debate concerning relative state and federal power to create the offense, King introduced the only note of skepticism as to the importance of limiting the definition of treason, when he

> observed that the controversy relating to Treason might be of less magnitude than was supposed as the legislature might punish capitally under other names than Treason.

Taken in its general implications, this was clearly not the view of Messrs. Gouverneur Morris and Randolph, who moved to postpone further consideration of the suggested treason clause in order to take up a substitute which declared:

> Whereas it is essential to the preservation of liberty to define precisely and exclusively what shall constitute the crime of Treason, it is therefore ordained, declared & established, that if a man do levy war agst. the U. S. within their territories, or be adherent to the enemies of the U. S. within the said territories, giving them aid and comfort within their territories or elsewhere, and thereof be provably attainted of open deed by the People of his condition, he shall be adjudged guilty of Treason.

Despite its preamble, this proposal seems less confining than that of the Committee of Detail; but

it is clear that its proponents offered it out of a desire to set closer limits to the crime. Their motion was defeated, 8–2; but the vote seems to express a preference for working with the pending draft in order to get on with the day's business, rather than a disagreement on the merits, for before the day was out the two principal additions of the Morris-Randolph draft ("aid and comfort" and the requirement of an overt act) were inserted in the draft which lay before the Committee of the Whole.

In addition to the implications of such discussion of the general language used in the section, distrust of the possible scope of the offense is reflected particularly in the amendment made to the clause concerning adherence to enemies. There was initially some confusion over just what was broad, and what was narrow terminology here. Randolph introduced the subject by saying that he

> thought the clause defective in adopting the words "in adhering" only. The British Stat: adds, "giving them aid and comfort" which had a more extensive meaning

Ellsworth "considered the definition as the same in fact with that of the Statute", and in replying to him, Gouverneur Morris reflected some confusion over the breadth of the terms involved, saying that

> "adhering" does not go so far as "giving aid and comfort" or the latter words may be restrictive of "adhering" * * * in either case the Statute is not pursued.

Wilson thought the added words no limitation: he

> held "giving aid and comfort" to be explanatory, not operative words; and that it was better to omit them—

Dickinson then objected from the viewpoint of one concerned to limit the definition: he

> thought the addition of "giving aid and comfort" unnecessary & improper; being too vague and extending too far—

Doctor Johnson apparently felt the added words would limit, by explaining, the basic terms in the provision, since he "considered 'giving aid and comfort' as explanatory of 'adhering'." Randolph and Morris then made the motion to postpone consideration of the draft by the Committee of Detail, to consider the draft quoted above. The restrictive purpose indicated by their proposed substitute seems rather inconsistent with their earlier indications that they regarded the "aid and comfort" phrase as possibly extending the area of the offense, for it was, nevertheless, employed in their own proposal. However, after all of this confusion, the final action of the day was taken on a clearly restrictive note.

> Col. Mason moved to insert the words "giving (them) aid comfort", as restrictive of "adhering to their Enemies &c" the latter he thought would be otherwise too indefinite—This motion was agreed to (Conv: Del: & Georgia only being in the Negative).*

* Words in parentheses are from the Journal.

Mason was being consistent with his expression of opinion, at the outset, in favor of "pursuing the Stat: of Edwd. III".

Finally, a fundamentally restrictive attitude also marks the treatment of the requirements of an overt act and of two witnesses to establish the offense. The draft by the Committee of Detail did not refer to the proof of an overt act. The Journal of August 20 notes that a motion was adopted to insert the words "some overt act of" at the beginning of the draft clause, so that the draft read, "Treason against the United States shall consist only in some overt act of levying war against the United States, etc. * * *" Subsequently, the Committee of the Whole inserted "to the same overt act" after "witnesses", and it was then voted to strike the reference to overt acts which had been placed at the beginning of the section. Curiously, Madison's "Notes" contain no direct reference to these various votes; but the inference seems fair that there was a definite intention to require the showing of an overt act as an independent element of the offense, and that the first insertion, which made this plain, was stricken probably for artistic reasons, after the reference to an overt act had been linked with the requirement of two witnesses.[2] This harmonizes with the statement of Mr. Dickinson, who

> wished to know what was meant by the "testimony of two witnesses", whether they were to be witnesses to the same overt act or to different overt acts. He thought also that proof of an overt-act ought to be expressed as essential to the case.

[2] *Id.* 337-339.

Doctor Johnson also "considered * * * that something should be inserted in the definition concerning overt-acts."

The interpretation of the proceedings is somewhat clouded by the fact that the final exchange of comment on the language involving "overt act" emphasized solely the strengthening of the evidentiary guaranty against perjury. When it was moved to insert "to the same overt act" after the two-witness requirement, Madison notes that

> Doct Franklin wished this amendment to take place—prosecutions for treason were generally virulent; and perjury too easily made use of against innocence.

And James Wilson observed that

> much may be said on both sides. Treason may sometimes be practised in such a manner as to render proof extremely difficult—as in a traitorous correspondence with an Enemy.

The vote was 8–3 in favor of inserting the overt-act phrase in connection with the requirement of two witnesses. Though this may seem to subordinate the overt-act phrase, the inference seems a fair one, from the record as a whole, that it was thought important to stipulate expressly that an overt act should constitute a distinct element of proof of the offense.

As much time was devoted on August 20 to discussing the problem of treason in the federal system—the extent to which the central government and the states might, respectively, undertake to define the offense—as was given to debate on all the other points considered. However, the de-

bate on the general phrasing and elements of the offense, so far as it went, seems clearly to establish a general agreement on the wisdom of limiting the scope of the offense in all doubtful cases." The only respects in which the Convention may be said to have rejected opportunities to confine the scope of the offense were in rejecting the suggestions that the states be denied any authority to define treason against themselves, and that participation in a civil war between a state and the nation, be excepted. The debate seems, however, to have turned on judgments of what would constitute an equitable and workable plan in this regard for a federal system; and to have involved no conscious departure from the policy of safeguarding the individual from oppressive extensions of the nature of "treason".[88]

The only member of the Convention of whose views we have any substantial evidence, apart from the record of the Convention discussion, is

[88] The other point in connection with "treason" which led to considerable discussion was the proposal to deprive the President of the power to pardon in such cases. This debate yields no help on the definition of the scope of the offense, save as it further indicates the general understanding that fundamental domestic disturbances were embraced within "treason". 2 *id.* 626-627. The concern manifested in this discussion of the pardon power, lest the President abuse it to protect his accomplices in an effort to take unconstitutional power to himself, seems the only instance in which a positive concern for the safety of the state qualified the Convention's general preoccupation with protection of the individual.

[89] 2 Farrand, *op. cit. supra*, note 80, pp. 345, 348-349; 3 *id.* 223.

James Wilson. He is a key figure, however, as a member of the Committee of Detail, which took the responsibility for taking a restrictive rather than an extensive approach to the definition of the offense. The crisp statement and logical progression of the clause as it came from the Committee of Detail strongly suggests the hand of Wilson, probably the ablest lawyer on the committee.[99] We have seen that Wilson had long been familiar with basic English materials on the law of treason. In 1778 he had joined the defense in the Pennsylvania treason trials when that was a highly unpopular thing to do, and had stoutly upheld the wisdom of avoiding the creation of novel treasons by staying close to the familiar terms of the Statute of Edward III. His participation in the Convention discussion of August 20 is not very illuminating, it is true. He was against inclusion of the "aid and comfort" phrase, significantly, however, on grounds of draftsmanship and not of policy. Regarding the two witness requirements, he recognized the dangers of putting an impractical burden on the prosecution; but when the question was put to the vote, the Pennsylvania delegation was recorded as unanimous for the limitation. His papers contain an undated memorandum headed "Reasons for adopting the Constitution", and

[99] Cf. Nott, The Mystery of the Pinckney Draught (N. Y. 1908) 187. Wilson speaks most positively in the discussions of the treason clause in the role of draftsman-technician. See 2 Farrand, *op. cit. supra*, note 80, pp. 346, 348-349.

among the 17 points which he thought significant enough to list was[2]:

> The accurate Description of Treason—its [one word and part of another crossed out: apparently "mild Puni", probably "mild Punishment] Consequences confined to the Cri [Criminal?]; consid. Art. 3. s. 3. Mont. 6.12.c. 7. ss. 18. [apparently a reference to Montesquieu]

The inference, that Wilson took particular interest in the treason clause, and that he believed its virtue lay in its fundamentally restrictive character, is borne out by his detailed praise of it in the Pennsylvania ratifying convention. Twice, of his own motion, and without any criticism of the provision having been voiced by an alert and suspicious opposition, Wilson cited the clause as an ornament of the proposed Constitution. On December 4, 1787, in his speech pointing out the positive qualities of the Constitution, Wilson, after defending the extent of the judicial power conferred, said:

> I am happy to mention the punishment annexed to one crime. You will find the current running strong in favor of humanity; for this is the first instance in which it has not been left to the legislature to extend the crime and punishment of treason so far as they thought proper. This punishment, and the description of this

[2] Papers of James Wilson, 1775–1792 (MSS. Pennsylvania Historical Society) 60. On page 59 is a list of "Objections", none of which refers specifically to treason. Number 26 on this list, however, is—"Crimes shall be tried by Jury: therefore Congress may declare Crimes."

> crime, are the great sources of danger and persecution, on the part of government, against the citizen. Crimes against the state! and against the officers of the state! History informs us that more wrong may be done on this subject than on any other whatsoever. But, under this Constitution, there can be no treason against the United States, except such as is defined in this Constitution. The manner of trial is clearly pointed out; the positive testimony of two witnesses to the same overt act, or a confession in open court, is required to convict any person of treason. And, after all, the consequences of the crime shall extend no further than the life of the criminal; for no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.[92]

Again, on December 7, 1787, after taking the opposition to task for assuming the worst motives in the people's governors and representatives, Wilson argued that there was no special reason to fear this where the government had no separate interests from those of the people. He continued:

> Whenever the general government can be a party against a citizen, the trial is guarded and secured in the Constitution itself, and therefore it is not in its power to oppress the citizen. In the case of treason, for example, though the prosecution is on the part of the United States, yet the Congress can neither define nor try the crime. If we have recourse to the history of the different governments that have hitherto subsisted,

[92] 2 Elliott, *op. cit. supra*, note 78, p. 469.

> we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason. Some very remarkable instances have occurred, even in so free a country as England. If I recollect right, there is one instance that puts this matter in a very strong point of view. A person possessed a favorite buck, and, on finding it killed, wished the horns in the belly of the person who killed it. This happened to be the king; the injured complainant was tried and convicted of treason for wishing the king's death."

Wilson placed such emphasis on the constitutional provision that he devoted an entire lecture to it in his law lectures delivered at the College of Philadelphia, in 1790 and 1791. Again, he stressed as the whole point of his analysis the virtues of setting careful bounds to the crime.

> It is the observation of the celebrated Montesquieu, that if the crime of treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power. * * *

Praising as the most important part of the Statute of Edward III the provision that the Parliament, and not the judges, should pass on novel cases claimed to be "treason", he argued the superiority of American law in placing this restrictive principle beyond even legislative encroachment:

> In this manner, the citizens of the Union are secured effectually from even legislative

[*] 2 Elliott, *op. cit. supra*, note 78, p. 487; McMaster and Stone, Pennsylvania and the Federal Constitution (Historical Society of Pennsylvania, 1888) 351–353; 3 Farrand, *op. cit. supra*, note 80, p. 163, CL.

> tyranny: and in this instance, as in many others, the happiest and most approved example of other times has not only been imitated, but excelled."[4]

Such continuing concentration on a clause which, whatever its merits, is certainly not one of the more conspicuously discussed parts of the Constitution, strongly suggests pride of authorship. At any rate, there can be no doubt as to the central conclusion of policy which Wilson would derive from the clause for the guidance of legislators and judges.

If we turn from the Philadelphia Convention and its members to the great debate which surged throughout the country over the ratification of the Constitution, the story is the same. The Constitution was everywhere under attack, because it contained no Bill of Rights, and created a strong government with broad powers, which the imagination of its opponents foresaw could be turned in many ways to destroy the liberties of the citizen. In this situation, it is of the highest significance that without material exception, the treason clause was adduced only by proponents of the Constitution, as a prideful argument for the protection with which that document surrounded the individual; and that there was no real effort made at any time, so far as the record shows, to claim that the new government could oppress its people under the guise of prosecutions for "treason".

[4] Lectures on Law, delivered in the College of Philadelphia 1790 and 1791, Ch. V, 3 Works of Hon. James Wilson (Bird Wilson, ed. Philadelphia, 1804) 95–106. As a check on the completeness of the search of the Wilson papers, this study has enjoyed the counsel of Mr. Burton Alva Konkle of Swarthmore, Pa., long a student of Wilson's career.

Madison sets the tone of debate, in *The Federalist*,

> As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.[95]

In another number of *The Federalist*, Hamilton lists the treason section among several provisions protecting the liberties of the individual, in answer to the criticism of the absence of a Bill of Rights.[96] In Massachusetts, "Cassius" (James Sullivan) asserted, of the treason clause:

> This section is truly republican in every sense of the expression, and is of itself fully

[95] *Op. cit. supra*, note 78, No. XLIII, pp. 269, 463. Madison here takes an advocate's position in interesting contrast to his opinion on the floor of the convention in favor of broader discretion for the legislature. However, this does not affect the relevance of his argument in The Federalist, as reflecting the prevailing thought by which the treason clause was believed justified. Compare his warning, in his first speech in the Virginia ratifying convention, that in republics the turbulence, violence and abuse of power of majorities have more frequently than any other cause produced despotism. 3 Elliott, *op. cit., supra*, note 78, p. 87.

[96] *Id.*, No. LXXXIV, pp. 533, 534.

> adequate to proving that the members of the federal convention were actuated by principles the most liberal and free—— This single section alone is sufficient to enroll their proceedings on the records of immortal fame.
>
> Contrast this section with the laws of England, in regard to treason, and, notwithstanding the boasted rights of the subject in that isle, we shall find our own in this, as well as almost every other particular, far to exceed them.[97]

In North Carolina, "Marcus" (James Iredell) answered the objections which George Mason of Virginia had carried from the Convention to the hustings. Mason had raised the fear that under the "necessary and proper" clause in the enumeration of the powers of Congress, new crimes and unusual punishments might be created. Iredell pointed out that

> * * * in the case of treason, which usually in every country exposes men most to the avarice and rapacity of government, care is taken that the innocent family of the offender shall not suffer for the treason of their relation. This is the crime with respect to which a jealousy is of the most importance, and accordingly it is defined with great plainness and accuracy, and the temptations to abusive prosecutions guarded against as much as possible * * *[98]

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[97] Essays on the Constitution of the United States (Ford, ed. N. Y. 1892): Letters of Cassius, X, p. 42.

[98] Pamphlets on the Constitution of the United States (Ford, ed. Brooklyn 1888) 360; 2 McRee, Life and Correspondence of James Iredell (N. Y. 1857) 199, 207. Cf. the numerous charges to federal Grand Juries, by Mr. Justice Iredell, in McRee.

The closest approach to a clash over the treason clause in the state ratifying conventions took place in Virginia. Replying to a speech of Patrick Henry in which the spectre of "the most grievous oppressions" had been raised, George Nicholas took the initiative in citing the treason clause:

> Treason consists in levying war against the United States, or in adhering to their enemies, giving them aid and comfort. The punishment of this well-defined crime is to be declared by Congress; no oppression, therefore, can arise on this ground. This security does away the objection that the most grievous oppressions might happen under color of punishing crimes against the general government. The limitation of the forfeiture to the life of the criminal is also an additional privilege.[99]

Subsequently, without directly attacking the treason clause, Henry complained of the failure to forbid cruel and unusual punishments:

> Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.

The constitutionalist leaders were not men to let a point slip by, especially so flagrant a slip. Nicholas promptly corrected Henry:

[99] Elliott, *op. cit. supra*, note 78, pp. 102–103.

> But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. Treason against the United States is defined in the Constitution, and the forfeiture limited to the life of the person attainted. Congress have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; but they cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution * * *

Randolph also caught up Henry on the point:

> The honorable gentlemen observe that Congress might define punishments, from petty larceny to high treason. This is an unfortunate quotation for the gentlemen, because treason is expressly defined in the 3d section of the 3d article, and they can add no feature to it. They have not cognizance over any other crime except piracies, felonies committed on the high seas, and offences against the law of nations.[100]

It is noteworthy that when the Virginia convention reached the treason section in its order in a section-by-section discussion of the Constitution, the record shows no mention of the provision, though there had been a very lengthy argument over the preceding parts of Article III.

The fight in North Carolina was a particularly hot one, and concluded with a refusal either to ratify or reject the proposed Constitution, but rather a stipulation that North Carolina would

[100] *Id.*, 447, 451, 466.

ratify if certain rights were declared and ambiguous passages clarified. Since the opposition was alert to point out every aspect in which they saw the danger of political oppression of the individual under the new government, it is again significant that when the convention reached the treason clause in its section-by-section consideration of the document, the record states merely, "3d section [Article III] read without any observation."

Subsequently, what began as apparent criticism of the treason clause ended in weak professions of mistaken meaning on the part of an opposition leader. Mr. Lenoir had claimed, against the Constitution, that

> They have also an exclusive legislation in their ten miles square, to which may be added their power over the militia, who may be carried thither and kept there for life. Should any one grumble at their acts, he would be deemed a traitor, and perhaps taken up and carried to the exclusive legislation, and there tried without a jury. We are told there is no cause to fear. When we consider the great powers of Congress, there is great cause for alarm. * * * * * * There is no assurance of the liberty of the press. They may make it treason to write against the most arbitrary proceedings.

Richard Dobbs Spaight, a member of the Philadelphia Convention, in return expressed astonishment at the extreme fears voiced:

> But the gentleman has gone farther, and says, that any man who will complain of their oppressions, or write against their usurpation, may be deemed a traitor, and

> tried as such in the ten miles square, without a jury. What an astonishing misrepresentation! Why did not the gentleman look at the Constitution, and see their powers? Treason is there defined. It says, expressly, that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. Complaining, therefore, or writing, cannot be treason. [Here Mr. Lenoir rose, and said he meant misprision of treason.] The same reasons hold against that; too * * * [101]

In other states, advocates of the Constitution cited the treason clause as a valued part of the document; and the opposition maintained silence.[102] The only respect in which the debates over ratification may be said to have suggested a broader concept of "treason" in consequence of the provisions of the Federal Constitution was the inference which might be drawn that any circumstances which would call into play the guaranty extended to every state of a republican form of government would probably involve treasonable conduct on the part of those threatening the state government. But at most this seems to involve no more than application of familiar precedents concerning the constructive levying of war.

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[101] *Id.*, 176, 203, 205, 209. Compare Iredell's further reply to Lenoir, *id.*, 219, 220.

[102] See remarks of General Brooks in the Massachusetts Convention, in Debates, Resolutions and other Proceedings of the Convention of the Commonwealth of Massachusetts (Boston, 1856) 291; remarks of Messrs. Hartley and M'Kean, in the Pennsylvania Convention, McMaster and Stone, *op. cit. supra*, note 93, pp. 291, 375.

(2) The Content of the Basic Policy

A close examination of the evidence makes it possible to suggest in certain respects a more precise statement of what the strict construction policy of the treason clause involves. In the first place, though the most obvious emphasis in discussion was upon limiting the power of the legislature to extend the scope of "treason", there can be no doubt that the restrictive policy was intended likewise to limit judges and to curb the creation of novel treasons by construction. This was certainly Wilson's intent. As defense counsel in the treason cases of 1778 he had strongly urged that courts should construe strictly the terms of treason statutes and take care not to extend the crimes there defined. In his December 7 speech to the Pennsylvania ratifying convention, he chose as an example of the perils of a loose extension of the offense one of the most cited instances of the "constructive" (i. e., judge-made) treasons of English law. In his law lectures, in 1790, he emphasized that the great advance made by the Statute of Edward III was to curb the power of the judges by reserving to Parliament the right to decide whether novel cases should be deemed treason, and his praise for the provision in the Constitution was that it improved the English situation by broadening the limitation to cover the legislature as well.[36] There would seem significance in the fact that the Committee of Style

[36] On the issue of whether by acting as city gatekeeper by appointment of the British, Carlisle had, within the meaning of the Pennsylvania act, taken a "commission" from the enemy, Wilson cited Blackstone for the strict construction of penal statutes. 7 Pennsylvania Archives,

shifted the treason clause out of Article I into Article III in the final shaping of the document; the matter of the scope of the offense had been so clearly taken from Congress that it was logical to place the remaining admonition of policy in the part of the document dealing with the courts, which must still administer the clause.[104] In 1792, Mr. Justice Iredell, who, we have seen, had cited the treason clause in support of the Constitution in the North Carolina convention, viewed it as preventing the punishment of "constructive acts of treason".[105]

Though the restrictive policy was taken to limit judges as well as legislators, the treason clause

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op. cit. supra, note 35, p. 50. The English case referred to is that of the slain buck, note 93, *supra*. In addition to the quotations, note 94, *supra*, see the references to the "uncertain and ambiguous" state of the common law of treason, and to Hale's praise for "the great wisdom and care of the parliament, to keep judges within the bounds and express limits of this statute, and not to suffer them to run out, upon their own opinions, into constructive treasons, though in cases which seem to have a parity of reason." Lectures on Law, 3 Works, *op. cit. supra*, note 94, pp. 96, 97.

[104] *Cf.* Warren, The Making of the Constitution (Boston 1928) 489-490.

[105] Charge Delivered to the Grand Jury for the District of Massachusetts, in the Circuit Court of the United States, Boston, October 12, 1792, 2 McRee, *op. cit. supra*, note 98, p. 368. Iredell was not yet displaying the extreme Federalist position which marked his charges to juries in later years, and his emphasis on the limitation of judge-made "treason" may fairly be taken to reflect a prevailing attitude of 1789. Compare his remarks in the pamphlet in answer to Mason's objections to the Constitution, note 98, *supra*.

used words of the Statute of Edward III upon which English judges had had much to say over centuries. Despite the condemnation of "constructive" treasons in political polemics, it was also assumed that "levying war" or "adhering to enemies" would be construed in the light of previous application of these terms. Wilson, indeed, found in the judicial gloss upon the words of Edward III's statute one of the sources of protection against oppression. Though the Statute had been "like a rock, strong by nature", he noted that it had been "fortified, as successive occasions required, by the able and honest assistance of art," so as to stand "impregnable by all the rude and boisterous assaults, which have been made upon it, at different quarters, by ministers and by judges." These qualities had now been borrowed for the strengthening of the Constitution:

> This single sentence comprehends our whole of national treason; and, as I mentioned before, is transcribed from a part of the statute of Edward the third. By those who proposed the national constitution, this was done, that, in a subject so essentially interesting to each and to all, not a single expression should be introduced, but such as could show in its favour, that it was recommended by the mature experience, and ascertained by the legal interpretation, of numerous revolving centuries.[100]

[100] Lectures on Law, 3 Works, *op. cit. supra*, note 94, pp. 99-100, see to the same effect, 2 Story, Commentaries on the Constitution of the United States (2d ed. Boston, 1851) 540.

It is quite evident, moreover—nor, in view of the prominence of Shays' Rebellion in the minds of the Constitution's proponents, is this surprising—that it was assumed that to some ill-defined extent the constructive levying of war would be covered by the treason clause.[107] The evidence thus poses a most difficult problem, which it does not resolve. The omission from the constitutional clause of any provision analogous to that in English law which punished compassing the death of the king removed the foundation on which the English judges had built much of the reprobated structure of "constructive" treasons. It is a fair inference, in view of the vigor with which the restrictive policy of the Constitution emerges from the evidence, that it would violate that policy to import into our law English doctrine based on the omitted clause of the Statute of Edward III.

[107] See, *e. g.*, discussions in the Federal Convention and the ratifying debates regarding the proposal to limit the President's power to pardon in cases of treason, 2 Farrand, *op. cit. supra*, note 80, pp. 637, 639; 3 *id.* 127, 158, 218; 4 *id.* 59, 60. See also references to the guaranty of a republican form of government for the states and protection against insurrection: 2 *id.* 47–49; The Federalist, *op. cit. supra*, note 78, Nos. XXV and LXXIV (Hamilton); 2 Elliott, *op. cit. supra*, note 78, pp. 430, 520–521; 3 *id.* 497, 498; 4 *id.* 20, 96; 142, 195, 220; *cf.* terms of amendments proposed in ratifying conventions, 1 *id.* 325, 326 (disarming citizens), 327, 328, 334, 335; 2 *id.* 542, 546; 3 *id.* 657, 658; 4 *id.* 245, 249 (martial law in time of insurrection). *Cf.* Charge of Mr. Justice Story on the Law of Treason, Delivered to the Grand Jury of the Circuit Court of the United States, Holden at Newport, for the Rhode-Island District, June 15, 1842 (Providence: Printed by H. H. Brown, 1842); Fed. Cas. No. 14,275, 30 Fed. Cas. 1046.

Even so, there were in English history ingenious constructions under those clauses of the Statute which the Constitution did adopt, and if the full gloss is to be taken with the clauses, the limiting value attributed to the use of the familiar words might be considerably depreciated. The problem is made the more difficult, because in England indictments often contained counts under both the charges of compassing the king's death and levying war against him, or adhering to his enemies; and broad rulings of the courts did not draw distinctions as to the relative scope of these different charges. All that can be said is that, so far as the contemporary materials are concerned, their weight is clearly in favor of resolving doubts on the side of precise definition of the offense. Obviously this is the point of Wilson's law lectures.[108]

It seems possible, finally, to cast some light on the particular type of oppression which the proponents of the treason clause feared under loose definitions of the offense. Aside from what may be implied in Dr. Franklin's reference to the "virulence" of prosecutions for treason as creating the danger of perjured evidence, the data suggest that the fear most in mind was of abuse of "treason" for the building or upholding of domestic political faction, rather than its vin-

[108] Note 106, *supra*. Compare the same problem as posed by Jefferson's use of the terms of Statute Edward III in his proposed revision of the Virginia criminal code, note 42, *supra*. Foster, 217-218, evidently felt that the mingling of charges of compassing and adhering did not serve to limit the authority of decisions regarding the scope of the latter charge. Compare, however, 8 Holdsworth, H. E. L. (2d ed. London 1937) 318.

dictive use under wartime hysteria against "enemies". This is not the same thing as to draw a line between the offenses of levying war and adhering to enemies, and to apply a policy of strict construction only to the former. Though limited to wartime, the latter offense might obviously then be put to oppressive use against political foes or restless classes by the familiar technique of holding them to the "natural consequences" of their conduct.[10] What is suggested is that the historic policy restrictive of the scope of "treason" under the Constitution was most consciously based on the fear of extension of the offense to penalize types of conduct familiar in the normal processes of the struggle for domestic political or economic power. The sale of provisions to an enemy in wartime, or the conveying of intelligence to him, or the proffer of counsel and assistance to his agents, are types of conduct quite distinct from activities of a sort which political opponents or economic groups would normally resort to in their efforts to influence public policy. There is less danger that charges of this type could, in view of the sharply defined character of the conduct in question, be used to suppress free competition for the power to direct the policies of the republic. It is not that the offense of adhering to enemies is, *in toto*, exempt from the restrictive policy of the Constitution, but that that policy was formed with attention directed at only

[10] *Cf.* McKinney, Treason under the Constitution of the United States, (1918) 12 Ill. L. Rev. 381; Warren, What is Giving Aid and Comfort to the Enemy? (1918) 27 Yale L. J. 331.

certain types of the conduct which might constitute adherence."[110]

There is little that is helpful in developing this point in the Convention discussion. It is worth recalling, however, that, when the proposal to require "two witnesses to the same overt act" was laid before the Committee of the Whole, following Franklin's expression of fear over the "virulence" of prosecutions for treason and the ease with which perjury was used against innocence, James Wilson commented that

> much may be said on both sides. Treason may sometimes be practised in such a manner, as to render proof extremely difficult —as in a traitorous correspondence with an Enemy.[111]

Wilson apparently voted in favor of the more strict two-witness requirement, but this vote on the evidentiary safeguard does not necessarily limit the implications of his suggestion of a stronger hand in defining the offense of trafficking with the enemy. In the debate in the Pennsylvania ratifying convention, it is a reasonable implication that Wilson is concerned for suppression of essentially political conduct, when he exclaims

> Crimes against the state! and against the officers of the state! History informs us that more wrong may be done on this subject than on any other whatsoever.

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[110] The concern shown in the Convention discussion that the phrase regarding "aid and comfort" be added to "adhering" in order to limit the latter, shows that a theory of a wholesale liberal construction of this offense is not supportable. See note 86, *supra*.

[111] 2 Farrand, *op. cit. supra*, note 80, p. 348.

When he cited a case to illustrate the excesses of the English law of "constructive" treason, it was one in which the charge had been domestic disloyalty to the king, "compassing the death of the king." Moreover, he argued that there was no special reason to fear governmental oppression where the government did not have separate interests from the people—which would be the case as regards protection against actual dealings with the enemy—and then adduced the treason clause to show that "Whenever the general government can be a party against a citizen, the trial is guarded and secured in the Constitution itself. * * *" In this context, his caution that

> If we have recourse to the history of the different governments that have hitherto subsisted, we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason

is properly read as aimed at cases where the government and people might have separate interests: i. e., where the real issue was the control of domestic power.[112]

The abuses which the pamphleteers believed defeated by the Constitution's treason clause seem most likely to have been the suppression of political opposition or the legitimate expression of views on the conduct of public policy. The dan-

[112] See notes 92 and 93, *supra;* Lectures on Law, 3 Works, *op. cit. supra*, note 94, pp. 96, 98, 99. It should be remembered, however, that as counsel for the defense in the Carlisle case in 1778, Wilson had argued for a strict construction of the Pennsylvania statute defining adherence to the enemy. See notes 35, 42 and 103, *supra*.

ger pointed to by Madison in *The Federalist* was that

> new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other. * * *[113]

References in other discussions to the protection offered by the treason clause against the "avarice and rapacity of government," to its "truly republican" character and its "pre-eminence in the scale of political security" likewise imply primary attention to the use of the offense against normal activities of political opposition and opinion.[114] In 1808, Rufus King, who had figured prominently in the work of the Federal Convention, wrote to Pickering commenting on the bill introduced by Senator Giles to correct the gaps in the law which it was conceived, had permitted Burr to escape conviction. King's remarks are, of course, prompted by his ardent anti-Jeffersonian position, but his opinion of the history of the policy informing the treason clause so tallies with the contemporary evidence as to deserve note:

> The limitation which the Constitution establishes on the subject of Treason, proceeded from a principle, which will readily be approved by every man who is acquainted with the vindictive spirit that, at different times in the History of England,

[113] *Loc. cit. supra*, note 95. *Cf. id.* No. LXXIV (Hamilton). 4 Tucker, *op. cit. infra*, note 120, pp. 40–41.

[114] The quotations are from Iredell, note 98, *supra*; "Cassius", note 97, *supra*; and Hartley, note 102, *supra*. *Cf.* Grand Jury charges of Iredell, J., in 2 McRee, *op. cit. supra*, note 98, pp. 391 (1793) and 468 (1796).

has animated the ascendant faction against their political adversaries. If the proposed law on the subject of Treason neither enlarges nor lessens its constitutional definition, the law is unnecessary; if it does the one or the other, it is unconstitutional. In the unfortunate periods, during which a country is torn by contending factions, the Treason Laws should not be altered. Neither ought they to be changed just at the time, when the Govt. is angry or disappointed in the failure to convict such as are believed to have committed Treason. * * *[115]

(3) Elements of the Offense

The materials for the period of the Constitution cast little light on detailed problems of the elements of "treason." Aside from the refer-

[115] 5 King, Life and Correspondence of Rufus King (N. Y. 1898) 73-75. Compare Hamilton's opinion against the radical treason act proposed by Lloyd in 1798, in a letter of June 29, 1798, to Wolcott: "*Let us not establish a tyranny.* Energy is a very different thing from violence." 3 Adams, History of the United States (N. Y. 1898) 468, after noting that laymen might think Marshall could have reached another result in some of his rulings in the Burr trial, if he had so chosen, comments:

> On the other hand, the intent of the Constitution was clear. The men who framed that instrument remembered the crimes that had been perpetrated under the pretence of justice; for the most part they had been traitors themselves, and having risked their necks under the law they feared despotism and arbitrary power more than they feared treason. No one could doubt that their sympathies, at least in 1788, when the Constitution was framed, would have been on the side of Marshall's decision. If Jefferson, since 1788, had changed his point of view, the chief justice was not under obligations to imitate him.

ences to the Statute of Edward III, there is no mention in the Convention's discussion of the idea that use of the word "treason" of itself imported any particular doctrines, though obviously it was used to express the central concept of betrayal of allegiance. The idea of "allegiance" itself receives no exposition, however. "Treason" also bears the implication that a specific intent to betray must be shown, and though there is no direct evidence on the point, the whole emphasis on a policy of strict construction in defining the offense reinforces the normal implication of the language.

Though the constitutional provision is phrased somewhat backhandedly on the point, it is clear from the development of the section that the overt act is intended as a distinct element of proof of the offense in addition to intent. This would seem at least clearly to rule out treason prosecutions for the mere holding of dissident opinions.[116] An effort, by violence, to resist the general execution of the laws, however, would apparently be viewed by the proponents of the treason clause as sufficient to make out a levying of war.[117] "Traitorous" correspondence with the enemy would establish adherence to him.[118] Beyond these scant items, the constitutional record gives us no specific help.

The sequence of amendments by which the evidentiary clause was strengthened clearly shows a strongly felt policy to be involved. What that policy aimed at seems quite simple. Franklin

[116] See Spaight, note 101, *supra*.
[117] See note 107, *supra*.
[118] Note 111, *supra*.

feared that the government would procure perjured witnesses, and evidently felt that the requirement as written would make this task more difficult. This explanation was the accepted basis of the clause. If any more specific history explains the reason for placing the evidentiary requirement in the Constitution, there seems no evidence of it.

In the Act of April 30, 1790, Congress substantially restated the language of the constitutional provision and, exercising its power to fix the penalty, decreed death. There is no record of any discussion concerning this first federal treason statute which casts light on contemporary views of the constitutional provision.[11a] Contem-

[11a] 1 Stat. 112, Ch. IX. The penalty provision was subsequently modified by the addition of alternative penalties of fine and imprisonment. The Journal of Senator Maclay (Harris ed., Harrisburg, 1880) 128, 129, 158, 163, 164, 165, records stages in the passage of the bill containing the treason section, through the Senate. He notes that there was little debate on any aspect of the bill and records no mention of the treason section.

By the Act of September 6, 1788, Ch. VI, the Governor and judges of the Northwest Territory adopted a "Law respecting Crimes and Punishments" which declared the offense of treason against the United States and against the territory, in terms reminiscent of the Revolutionary period, and in several respects probably in excess of the constitutional provision (conspiracy included; no evidentiary provision). See The Laws of the Northwest Territory, 1788–1800 (Pease ed., Illinois State Historical Library, Springfield, 1925), 17 Collections of Illinois State Historical Library, Law Series, Vol. I, p. 13; *cf.* p. 322. The territorial laws were so obviously inartistic, however, that this act cannot be taken seriously as a contemporary exposition of what crimes might be defined under the constitutional provision.

porary treatises drew their statements on the specific incidents of treason from English decisions and the early 19th century American decisions, but found no further enlightenment in the constitutional materials. All emphasize, however, the fundamentally restrictive policy represented in the constitutional provision.[120]

2. TREASON UNDER THE CONSTITUTION

Such doctrinal development as there is concerning "treason" after the adoption of the Constitution is contributed primarily by the judges; treatise

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[120] See Tucker's Blackstone's Commentaries with Notes of Reference, to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia (Philadelphia, 1803) 73, n. 1; 75, n. 2; 76, n. 3; App., Note B, pp. 11, 16–17, 39, 40–41; Rawle, A View of the Constitution of the United States (2d ed. Philadelphia, 1829) 139 ff.; Sergeant, Constitutional Law (Philadelphia, 1822) 367; 2 Story, Commentaries on the Constitution of the United States (2d ed. Boston, 1851) 539–540.

Rawle, however, does analyze the overt act element of the crime in a fashion which implies that the scope of the offense should be sufficiently broad to give preventitive protection to the state, when he says (p. 141):

> It is one of those crimes which may not be accomplished by single act; but on the contrary, is in its very nature progressive yet continuous. Robbery, murder, and many other crimes, are or may be effectuated in a short space of time; and when the body is deprived of life or the goods are taken from the spot, the perpetration of the guilt is full and entire; but the attempt to subvert a government is not a momentary act; combinations are formed, unlawful schemes devised and pursued; opposition is commenced and carried on, and the crime is ever the same; the protraction of time may

discussions are either scissors and paste-pot affairs, or horn-book recitations of question-begging generalities. The judges, however, shine mainly by comparison. In view of the great potentialities for good and evil in the instrument of treason prosecutions, it is surprising how little judicial imagination has been stirred to clarifying analysis in such cases as have presented themselves. The American cases serve little more than to annotate the doctrine, explicit or implicit, of the 17th and 18th century English treatises. Perhaps the explanation is that in the 19th century the executive and legislative branches took the creative initiative, by choosing no longer to employ the treason charge as the principal bulwark of state security. This is especially marked in the states; the trials of Thomas Dorr, and John Brown for treason by levying war against the states of Rhode Island and Virginia, respectively, seem to be the only completed treason prosecution by state authorities.

In their basic approach to the definition of "treason", the American cases have continued the ambiguous mingling of affirmation and restriction which marks the period of constitution making. Thus, on the one hand, the policy most frequently expressed in judicial opinions is that of careful restriction of the scope of the crime, pursuant to the wisdom of the framers. No opinion spells out precisely what form this restrictive policy should take: whether it merely bans the addition of new categories of subversive conduct to the two branches of

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increase the terror and the injury, but in a legal view they do not enhance the guilt; in its outset it is deemed the highest crime that can be committed, and of course no subsequent circumstances can raise it higher.

"treason" stated in the Constitution, or whether it limits the kinds of conduct which may be charged under either of those two branches. Thus some opinions simply praise the constitutional provision for giving "definite" meaning to the offense.[1] Others furnish a little more light, by undertaking to explain the reasons behind the restrictive policy, even if they continue vague as to the tangible forms of its application. Three explanations are advanced. That which most certainly links with familiar English doctrine, is the inherent danger of abuse by the authorities and intimidation of the citizens, if the contours of the crime are vague and ill-defined. This is a broader ground of policy than the more specific fear of use of "treason" prosecutions in the rough and tumble of domestic faction; and suggests a general public interest in a reasonable certainty about the extent of political crimes, so that men may speak and act their political roles with proper freedom. Speaking for the Court, in *Ex parte Bollman*, Mr. Chief Justice Marshall declared that

> To prevent the possibility of those calamities which result from the extension of trea-

[1] See Chase, Circ. J., in Case of Fries, Fed. Cas. No. 5127, 9 Fed. Cas. 924, 930 (Circ. Ct. D. Pa. 1800) (second trial); Nelson, Circ. J., in Charge to Grand Jury, Fed. Cas. No. 18, 271; 30 Fed. Cas. 1034, 1035 (Circ. Ct. S. D. N. Y. 1861); *Stephan* v. *United States*, 133 Fed. (2d) 87, 90 (C. C. A. 6th, 1943), cert. den. 319 U. S. 781; argument of Sitgreaves, for the prosecution, and Ewing and Lewis for the defense, in the first trial of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 847–848, 887, 895–896 (Circ. Ct. D. Pa. 1799); argument of William Pinkney, for defense, in *U. S.* v. *Hodges*, Fed. Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815).

> son to offences of minor importance, that great fundamental law which defines and limits the various departments of our government, has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend.[2]

Charging the Grand Jury in the Massachusetts District, Mr. Justice Curtis found the Statute of Edward III to have been "enacted * * * mainly for the purpose of restraining the power of the crown to oppress the subject by arbitrary constructions of the law of treason."[3] In a contemporaneous Grand Jury charge, directed to problems arising out of mob resistance to execution of the Fugitive Slave Law, Sprague, D. J., made more explicit the conflicting interests of security and free discussion and political action:

> Discussion is free. Men of all classes and of every shade of opinion may, by argument or even declamation addressed to the reason or the passions, endeavor to impress new views upon the public mind. But if, in their opposition to the expressed will of society, they pass from words to deeds, and

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[2] 4 Cranch 75, 125–126, 2 L. Ed. 554, 571 (U. S. 1807). Compare, to similar effect, the charge to the jury by Livingston, Circ. J., in *U. S.* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 398, 402, 403 (Circ. Ct. D. Vt. 1808).

[3] Fed. Cas. No. 18,269, 30 Fed. Cas. 1024, 1025 (Circ. Ct. D. Mass. 1851). Compare, to similar effect, the charge of Field, Circ. J., in *U. S.* v. *Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 21 (Circ. Ct. N. D. Cal. 1863); charge to the Grand Jury, by Nelson, Circ. J., Fed. Cas. No. 18,271, 30 Fed. Cas. 1034, 1035 (Circ. Ct. S. D. N. Y. 1861); charge to the Grand Jury, by Leavitt, D. J., Fed. Cas. No. 18,272, 30 Fed. Cas. 1036 (Circ. Ct. S. D. Ohio, 1861).

> embody mischievous doctrines into criminal acts of resistance to law, whoever they may be, and whatever may be their position or their ultimate purposes, they must sooner or later find that the law is irresistible and overwhelming.[4]

So Judge Mayer, charging the jury in *United States* v. *Fricke*, saw in the overt act requirement of the crime a safeguard against convicting a man simply for beliefs, opinions and emotional leanings, and phrased this in terms broad enough to imply a general underlying policy concerning the scope of the offense.[5] And, in criticism of the scope of application of the Espionage Act in *Schaefer* v. *United States*, Brandeis, J., found it natural to turn for comparison to precedents which he had deemed outlawed by the policy of the treason clause:

> To prosecute men for such publications reminds of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act had in effect restored the crime of constructive treason.[6]

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[4] Fed. Cas. No. 18,263, 30 Fed. Cas. 1015, 1016 (D. Mass. 1851); cf. charge by Leavitt, D. J., loc. cit. supra, note 3, p. 1037. Compare also the decision of the Attorney General not to prosecute the leaders of the Pittsburgh meeting of September 7, 1791, though the resolutions there adopted criticizing government policy and petitioning Congress and the state legislature were a significant step in the unrest which culminated in the "Whisky Rebellion". (Note) 26 Fed. Cas. 499, 501, 503.

[5] 259 Fed. 673, 677 (S. D. N. Y. 1919).

[6] 251 U. S. 466, 493 (1920) (Holmes, J., concurring). Compare *Haywood* v. *U. S.*, 268 Fed. 795, 799–800 (C. C. A. 7th, 1920), cert. den., 256 U. S. 689, ruling that forcible

This thread of insistence on a policy against vagueness in the definition of the crime, in the interest of individual security and free give-and-take in community life, comes up to World War II in the charge to the jury in *United States* v. *Stephan*:

> From a reading of the Constitution, it is apparent that our forefathers mentioned treason, specifically because they were anxious to limit things. They wanted to fix it so Congress could not go too far. Our forefathers had all lived under governments in which the law had been oppressive to them. That is why they were making the United States, because they wanted to get free from oppressive governments and have a democ-

interference with operations of producers from whom the government was expecting to buy or had contracted to buy war supplies or any other supplies in war or peace, is not a forcible prevention of the execution of acts of Congress within the meaning of the general conspiracy act.

> How are the laws of the United States executed? By officials upon whom the duty is laid. Performance of that duty cannot be delegated. Producers, who have contracts to furnish the government with supplies, are not thereby made officials of the government. Defendants' force was exerted only against producers in various localities. Defendants thereby may have violated local laws. With that we have nothing to do. Federal crimes exist only by virtue of federal statutes; and the law-makers owe the duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen or subject may lose his life or liberty. Section 6 should not be enlarged by construction. Its prima facie meaning condemns force only when a conspiracy exists to use it against some person who has authority to execute and who is immediately engaged in executing a law of the United States.

racy, a government under which they could enjoy what they believed to be true liberty and have true opportunity, so they limited the things that Congress could do * * * they were thinking about fixing it so that Congress couldn't make any old thing treason * * * they wanted to have a law against treason, but at the same time they didn't want Congress to be able to make anything treason except the one thing they had in mind.

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Our forefathers did not want Congress to be able to take spitting in somebody's face, or anything of that kind, as being treason, so they tell the Congress itself what it is * * *

[The two-witness requirement also] shows a tendency of the framers of the Constitution to protect the people of the United States against their own Congress, to be frank about it. They had lived under laws which were oppressive to them. They said, "We are going to create the United States of America, and we will fix it so that our own law-making body cannot make too heavy a burden for us to carry."

Mr. Chief Justice Marshall suggested a second rationale for the careful restriction of the scope of "treason" when he pointed out, in *Ex parte Bollman*, that

As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the

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Quoted at 50 Fed. Supp. 740, note; *cf. id.* 743, note. This charge was approved in its entirety upon review of the conviction. *Stephan* v. *United States*, 133 F. (2d) 87, 99 (C. C. A. 6th, 1943), cert. den., 319 U. S. 781.

> tribunal before which it is made, a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.[8]

In the light of the experience of World War I, the most likely danger of unjust accusations born and prosecuted out of the heat of public passion would seem to be that of an expansion of "treason" to cover unpopular opinions or attitudes.[9] In the nature of the case, there will normally be fewer occasions on which public prejudice can vent itself by accusing the wrong man for committing an undoubted act of treason. The suggestion made in *Ex parte Bollman* has been adopted in several cases, which, however, create some ambiguity by linking the protection against public passion primarily to the two witness-overt act provision of the treason clause.[10] Mingling, as it does, a substantive (overt act) and an evidentiary (two witnesses) safeguard, the objects of this provision are themselves somewhat ambiguous; but the cases stress more the danger of convicting the "wrong man" than of unduly expanding the concept of "treason." Thus in

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[8] 4 Cranch 75, 125, 2 L. Ed. 554, 571 (U. S. 1807). *Cf.* Charge to Grand Jury, by Leavitt, D. J., Fed. Cas. No. 18,272, 30 Fed. Cas. 1036, 1038 (S. D. Ohio 1861).

[9] *Cf.* Chafee, Free Speech in the United States (Cambridge, 1942) 51–60.

[10] Charges to Grand Jury by Sprague, D. J., Fed. Cases Nos. 18,273 and 18,274, 30 Fed. Cas. 1039, 1042 (D. Mass. 1861, 1863).

United States v. *Haupt*, the Seventh Circuit Court of Appeals, stating that the charge of treason, in a time of national crisis, presents special dangers of unfair trials, linked this warning with a ruling that the trial court had abused its discretion in denying motions for severance of the trials of the several defendants after admission of much highly prejudicial evidence related only to some of the defendants." On the other hand, the charge to the jury, in the earlier case of *United States* v. *Fricke*, relates the danger of injustice through public passion both to the hazards of undue ex-

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[11] 136 F. (2d) 661, 671 (C. C. A. 7th, 1943), rev'g 47 Fed. Supp. 836 (N. D. Ill. 1942); see 47 Fed. Supp. 832. Significantly, the Seventh Circuit cited the *Bollman* case in connection with its warning. See *Chambers* v. *Florida*, 309 U. S. 227, 236 (1940), where the Court lists the two-witness requirement of the treason clause among the constitutional provisions there described as inserted "as assurance against ancient evils."

> From the popular hatred and abhorrence of illegal confinement, torture and extortion of concessions of violation of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal, free of prejudice, passion, excitement, and tyrannical power.

It is of course natural that in an opinion dealing with violation of procedural guaranties, the Court should focus its attention solely on the procedural protection offered by the treason clause, yet, it may not be without significance that the protection afforded by the limiting definition of "treason" is ignored.

pansion of the scope of "treason" and of conviction of the wrong man:

> Naturally, passion is high; patriotic men and women are concerned with the safety of their country; and in the excitement it is but human nature sometimes to lose sight of the calm requirements of the law, and convict, as the expression goes, on general principles; and so, to safeguard against anything of that kind, and in order to prevent the conviction of any man for what he had in his mind, as distinguished from what he did, the constitutional provision as to an overt act was inserted. * * * An overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime. * * * a person cannot be convicted of treason merely for having the intention in his own mind to adhere to and give aid and comfort to the enemy. This intention must be manifested by what is termed an overt act.[12]

There may be some reason to fear that public prejudice will play particularly upon prosecutions for adherence to the enemy, since the elements of the offense ensure that such prosecutions will spring out of wartime events, when general feeling is high.[13]

A more calculating use of the convenient vagueness of "treason" charges against foes in domestic factionalism may be, in contrast, the more likely abuse of the crime of levying war. In this aspect, a restrictive definition serves the policy of preserving the free, nonviolent competition of inter-

[12] 259 Fed. 673, 677 (S. D. N. Y. 1919) (Mayer, D. J.).

[13] See *U. S.* v. *Fricke*, *loc. cit. supra*, note 12; *U. S.* v. *Haupt*, *loc. cit. supra*, note 11; *cf.* charges by Sprague, D. J., note 10, *supra*.

ests in political, social, and economic life. With his characteristic capacity for casting out varied suggestive lines for doctrinal development, Mr. Chief Justice Marshall also had his word to say on this matter. Ruling on the motion for commitment of Burr, he saw the dangers of political faction as underlying the constitutional limits set to the crime of treason:

> As this is the most atrocious offence which can be committed against the political body, so is it the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosoms of contending parties struggling for power. It is that of which the people of America have been most jealous, and therefore, while other crimes are unnoticed, they have refused to trust the national legislature with the definition of this.[14]

And in *United States v. Hoxie,* in his charge to the jury, Livingston, as Circuit Justice, declared that the Constitution had set carefully defined limits to the crime

> with a jealousy on this subject, which a full knowledge of the excesses that had so often been committed in other countries by parties contending for dominion, was well calculated to excite. * * *[15]

[14] *U. S.* v. *Burr,* Fed. Cas. No. 14,692a, 25 Fed. Cas. 2, 13 (Circ. Ct. D. Va. 1807).

[15] Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 398 (Circ. Ct. D. Vt. 1808). This comment takes on particular emphasis because the charge as a whole so clearly reflects Livingston's sensitivity to the impeachment proceedings against Chase, J., for his "strong" expositions of the law of levying of war in the trial of Fries and his ardent expositions of the Alien and Sedition Laws to juries.

Moreover, after discounting the fervor of advocacy, it is still significant of a prevailing attitude towards the policy of the treason clause that in his answer to the impeachment charges brought against him, Mr. Justice Chase used similar reasoning to justify his refusal to permit defense counsel in the trial of Fries to parade before the jury the excesses of the earlier English treason cases:

> Is it perfectly clear that decisions made before that statute [25 Edw. III], 450 years ago, when England, together with the rest of Europe, was still wrapped in the deepest gloom of ignorance and barbarism; when the system of English jurisprudence was still in its infancy; when law, justice and reason, were perpetually trampled under foot by feudal oppression and feudal anarchy; when, under an able and vigorous monarch, everything was adjudged to be treason which he thought fit to call so, and under a weak one nothing was considered as treason which turbulent, powerful and rebellious nobles thought fit to perpetrate—is it perfectly clear that decisions made at such a time, and under such circumstances, ought to be received by the courts of this country as authorities to govern their decisions, or lights to guide the understanding of juries? Is it perfectly clear that decisions made in England, on the subject of treason, before the revolution of 1688, by which alone the balance of the English constitution was adjusted, and the English liberties were fixed on a firm basis; decisions made either during the curious civil wars, in which two rival families contended for the crown; when, in the vicissitudes of war,

death and confiscation in the forms of law, continually walked in the train of the victors, and actions were treasonable or praiseworthy, according to the preponderance of the party by whose adherents they were perpetrated; during the reigns of three able and arbitrary monarchs who succeeded this dreadful conflict, and relaxed or invigorated the law of treason, according to their anger, their policy, or their caprice; or during those terrible struggles between the principles of liberty, not yet well defined or understood on one hand, and arbitrary power insinuating itself under the forms of the constitution, on the other; struggles which presented at some times the wildest anarchy, at others the extremes of servile submission, and after having brought one king to the scaffold, ended in the expulsion of another from his throne? Is it clear that decisions on the law of treason, made in times like these, ought not only to be received as authorities in the courts of this country, but also to have great influence on their decisions? Is it clear that decisions made in England, as to what acts will amount to levying war against the king, personally, and not against his government, are applicable to the constitution and laws of this country? * * * Is all this so clear, that a judge could not honestly and sincerely have thought the contrary?[16]

[16] See Note to Case of Fries (second trial), 9 Fed. Cas. 938; *cf.* argument of defense counsel in *U. S.* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 117 (Circ. Ct. E. D. Pa. 1851). In his charge to the jury in the Fries case, Chase had, however, confined himself to brief, opening praise for the constitutional definition and proof requirements (9 Fed. Cas. 924, 930); and the argument from the excesses of English treason trials which he prevented Lewis

Of the three policies thus advanced in various American opinions to explain the restrictive character of the constitutional treason clause, only the last has a clearcut counterpart in the English discussions. The general policy against vagueness in so important a crime and in favor of free speech and free pursuit of interests generally in the community was not articulated in the previous English materials. Protection of the accused individual against the waves of public passion is an aspect of the treason clause policy which seems to have been brought to the fore by the special rigor of the two-witness requirement in the United States Constitution. Of these three policies, it is, again, only that designed to curb the abuses of political faction which finds clear expression in the discussions attendant upon the framing and ratification of the Constitution. Even the brief comments in the Convention regarding insertion of the two-witness requirement—notably Dr. Franklin's warning of the peculiar "virulence" of treason prosecutions—imply more the peril of political abuse of the offense than the danger of public prejudice.

As we noted in dealing with the materials pertinent to the framing and ratification of the Constitution, the question of the relevance of English authorities to the construction of the terms borrowed from the Statute of Edward III blurs the

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and Dallas from making to the jury, seems to have been directed essentially to enlisting the jury's sympathies for the policy of curbing factional use of "treason" prosecutions. See, e.g., argument of Dallas on the first trial of Fries, 9 Fed. Cas. 826, 878, 883, 879–881; and argument of Lewis, id., 897–899.

lines of the restrictive policy of the constitutional provision.[17] The words of the treason clause are obviously broad, and the need for interpretation inescapable in the face of the refusal of facts to fit into neat moulds.[18] But, the constitutional prohibition on creation of new "treasons" limits the courts as well as the Congress.[19] And, as the Burr trial demonstrates, this requires restraint not only in the adoption of offenses outside those defined in the Constitution, but also in the determination of the evidence which will suffice to make out the elements of adherence to enemies or levying of war.[20] In both respects the limits set by the Constitution might be evaded if the courts imported the full scope of English decisions interpreting and applying the Statute of Edward.

Counsel have sometimes argued, and judges have sometimes spoken, as if the policy of the Constitution required a wholesale refusal of any guidance from English authorities.[21] This ex-

[17] See charge to jury by Peters, D. J., in Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 909 (Circ. Ct. D. Pa. 1799) (first trial); charge to jury by Livingston, Circ. J., in *U. S.* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 398 (Circ. Ct. D. Vt. 1808).

[18] *Ex parte Bollman*, 4 Cranch 75, 127, 2 L. Ed. 554, 571 (U. S. 1807); *U. S.* v. *Burr*, Fed. Cas. No. 14,692a, 25 Fed. Cas. 2, 13 (Circ. Ct. D. Va. 1807).

[19] See *U. S.* v. *Burr*, Fed. Cas. No. 14,692a, *loc. cit. supra*, note 18; *id.*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55, 159.

[20] See Charge to Grand Jury, by Nelson, Circ. J., Fed. Cas. No. 18,271, 30 Fed. Cas. 1034, 1035 (Circ. Ct. S. D. N. Y. 1861); argument of Lewis, for the defense, in Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 897 (Circ. Ct. D. Pa. 1799) (first trial). Chase, Circ. J., refused to permit defense counsel to present to the jury in the second trial of Fries a picture of the extreme construc-

treme position is not, however, the law of the American opinions, which overwhelmingly assert the relevance of English constructions of the Statute of Edward III.[21] But, it is significant

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tions given to the Statute of Edward III by English judges. Defense counsel then withdrew from the case. Subsequently, in response to a request by President Adams, Dallas and Lewis sent to the President a memorandum of the argument which they had proposed to make at the second trial. This included the statement that

> As the spirit of the constitution is opposed to implied powers, and constructive expositions, we are bound to take the plain manifest meaning of the words of the definition, independent of any glossary which the English courts, or writers, may have affixed to the words of the English statute.

9 Fed. Cas. 948. Probably mindful of the fact that the impeachment of Chase rested in part on his refusal to let counsel argue this point, Livingston, Circ. J., noted the issue, but cautiously avoided it, in *U. S.* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 395, 398 (Circ. Ct. D. Vt. 1808). Because he found that no treason had been committed in that case, even within the definitions of the English authorities, he found it unnecessary to decide whether they had any binding effect, or to

> discuss a question which has been much agitated—whether, by the use of these terms, it was intended to adopt the technical meaning which they had already received in England: or whether, considering treason as a new offence against a newly created government, the constitution on this point was to be interpreted by itself, without reference to, or with the aid of any common law decisions whatever?

[21] Iredell, Circ. J., and Peters, D. J., in charges to the jury, Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 909, 912; Marshall, Circ. J., in direction to the jury in *U. S.* v. *Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55, 159–160; Kane, D. J., in charge to Grand Jury, Fed. Cas. No. 15,276,

that in early opinions, close to the times and ideas of the framers, two limitations were suggested on the use of English materials. In the first place, it was suggested that English doctrine developed under charges of compassing the death of the king had no proper relation to cases arising under the constitutional provision which pointedly omitted any analogue of that branch of the Statute of Edward III. Thus in charging the jury in the first trial of Fries, Judge Peters found the greater part of the objection to the doctrine of "constructive treason" to be "totally irrelevant here.—The subject of them is unknown, and may it ever remain so, in this country. I mean the compassing the death of the king." [22] And in the second trial, the reporter notes the following exchange between counsel for the prosecution and the Circuit Justice:

> Mr. Rawle was then producing an authority, when Judge Chase said, the court would admit, as a general rule, of quotations which referred to what constituted actual or constructive levying war against the King of Great Britain in his regal capacity; or, in

30 Fed. Cas. 1047, 1048 (Circ. Ct. E. D. Pa. 1851); Curtis, Circ. J., in charge to Grand Jury, Fed. Cas. No. 18,269, 30 Fed. Cas. 1024, 1025; Cadwalader, D. J., in *U. S.* v. *Greiner*, Fed. Cas. No. 15,262, 26 Fed. Cas. 36, 38 (E. D. Pa. 1861; Field, Circ. J., in charge to jury in *U. S.* v. *Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 21 (Circ. Ct. N. D. Cal. 1863); Sprague, D. J., in charge to Grand Jury, Fed. Cas. No. 18,273, 30 Fed. Cas. 1039 (D. Mass. 1861); *U. S.* v. *Cramer*, 137 F. (2d) 888, 894 (C. C. A. 2d, 1943); *cf. Driecker* v. *Salomon*, 21 Wis. 621, 626 (1867).

[22] Fed. Cas. No. 5,126, 9 Fed. Cas. 826, 909 (Circ. Ct. D. Pa. 1799).

> other words, of levying war against his government, but not against his person, because it was of the same nature as levying war against the United States would be applied here [sic]; so was that part called adhering to the king's enemies:—they may, any of them, be read to the jury, and the decisions thereupon—not as authorities whereby we are bound, but as the opinions and decisions of men of great legal learning and ability. But even then, the court would attend carefully to the time of the decisions, and in no case must it be binding upon our juries.[23]

Mr. Justice Chase's remarks suggest the second limitation which the early American authorities would place upon the use of English precedents.[24] In the first Fries trial, Mr. Justice Iredell informed the jury that

> * * * as these able and learned framers of our constitution borrowed the act, in terms, from the British statute alone, an authority with which they were familiar, * * * they certainly at least meant that the English authorities and definition of those terms should be much respected. Those gentlemen knew as well as any counsel at the bar, the danger of constructive

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[23] Fed. Cas. No. 5127, 9 Fed. Cas. 924, 927 (Circ. Ct. D. Pa. 1800); see also in the answer filed by Chase, J., to his impeachment, *id.*, 938.

[24] His views on the exclusion of English precedents antedating 1688 are set forth in great detail in that part of his answer to the impeachment charges, quoted at note 16, *supra*. That the impeachment of Chase did not rest on objections to these doctrines, but on his preventing counsel arguing them to the jury, see 11 American State Trials (Lawson, ed. St. Louis, 1916) 197, 241, 242, 272, 316, 345, 351.

> treasons; they knew how to guard themselves against the bad times of English history, and were equally acquainted with the better and more modern decisions. Would it not have been natural for men so able, so wise, so cautious of their liberties, had they entertained a doubt of their insufficiency, to have introduced some new guards, some new interpretations, and not to have left us in later time in the dark, exposed to so much danger as the gentlemen of the bar apprehend? Gentlemen who know anything of that country, know that arbitrary times have existed, and also that a number of decisions have taken place since that period. I do not believe that any judge since the revolution in England has ever considered that he was bound to follow every arbitrary example of the English courts, or the crown laws which had taken place in dark ages * * *[25]

In 1851, in directing a verdict of acquittal of the charge of levying war by participating in forcible resistance to execution of the Fugitive Slave Law, Mr. Justice Grier told the jury that in the interpretation of the treason clause, English decisions and treatises "which we know that the framers of our constitution would regard as the standard authorities in questions of legal definition" might

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[25] Fed. Cas. No. 5126, 9 Fed. Cas. 826, 912 (Circ. Ct. D. Pa. 1799). Likewise, Peters, D. J., in charging the jury, asserted the relevance of English precedents dating since the "bad times". *Id.* 909. As Iredell's remarks indicate, these instructions were directed against the defense argument, which had vividly depicted the excesses of English treason law. See note 16, *supra*.

be looked to; but he indicated that the earlier English authorities were of dubious value:

> Since the adoption of the constitution but few cases of indictment for treason have occurred, and most of them not many years afterwards. Many of the English cases, then considered good law and quoted by the best text writers as authorities, have since been discredited, if not overruled, in that country. The better opinion there at present seems to be, that the term "levying war" should be confined to insurrections and rebellions for the purpose of overturning the government by force and arms. Many of the cases of constructive treason quoted by Foster, Hale, and other writers, would perhaps now be treated merely as aggravated riots or felonies. But for the purposes of the present case, it is not necessary to pursue this subject further, or to look beyond the cases decided in our own country. The subject is one of too serious importance to allow this court to indulge in speculations, or wander from the safe path of precedent.[*]

Occasion has not presented itself for later courts to develop or deny these suggested doctrinal limi-

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[*] *U. S. v. Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 127 (Circ. Ct. E. D. Pa. 1851). Though he does not make clear how far he would carry his strong condemnation of the incorporation of English judicial constructions of the words of Edward III's Statute into the constitutional definition, Tucker would probably agree substantially with the soundness of distinguishing the earlier and later English decisions thus, as guides to policy. See 5 Tucker's Blackstone's Commentaries with Notes of Reference, to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia (Philadelphia, 1803), 85; n. 18, App. Note "B", pp. 13, 40–41, 46.

tations on the adoption of English treason authorities. They seem consistent with the restrictive policy evidenced in the terms and history of the constitutional provision, and with the generally conservative approach taken by almost all of the American opinions in expounding the law. The impeachment of one of their chief exponents does not cast doubt on their validity, for the charge levelled in this connection against Mr. Justice Chase was not that his distinction of the early English cases was inherently arbitrary or unreasonable, but that he denied counsel opportunity to make their own statement of that law to the jury. The impeachment of Chase was, moreover, too clearly partisan to carry weight on a professional matter; and in any case the Justice was acquitted.

The persistence of this stated policy of strict construction of the scope of "treason" is an element of continuity between the decisions and the materials seen in the period of the framing and adoption of the Constitution. It appears less in opinions and charges of the later years, but concern for the counter value of national security has never yet reached the point at which a court has openly repudiated the limiting policy. As the foregoing recital shows, the courts have been more ready to state reasons which they have seen underlying the strict construction policy, than they have to explain what it means in concrete application. Nevertheless, though the reported decisions in treason trials are not numerous, when they are examined with a view to checking the practical reality of the restrictive policy, the preponderance of acquittals and of specific rules laid down with careful regard to the protection of the accused

indicates that the restrictive policy has expressed an operative attitude and not merely a pious hope.[27] Specific intent has been quite rigorously

[27] Omitting Grand Jury charges and cases in which the enunciation of doctrines of the law of treason figured only incidentally one may list from the American materials 35 instances in which application of the law of treason as defined in the Federal Constitution may be said to have been in question. Classifying these cases, with reference to the vigor of the rules laid down against "treason", as "strong" (*), "moderate" (**), and "restrictive" (***), one emerges with nine instances in which "strong" doctrine is pronounced, two of these in the present war. In the following list, the cases are classified according to the asterisk symbols set out in the preceding sentence.

* Whiskey Rebellion cases: *U. S.* v. *Vigol*, Fed. Cas. No. 16,621, 28 Fed. Cas. 376 (Circ. Ct. D. Pa. 1795); *U. S.* v. *Mitchell*, Fed. Cas. No. 15,788, 26 Fed. Cas. 1277. Constructive levying of war, based on forcible resistance to execution of a single statute; defendants were convicted and later pardoned.

* House tax case: *Case of Fries*, Fed. Cas. Nos. 5126, 5127, 9 Fed. Cas. 826, 924 (Circ. Ct. D. Pa. 1799, 1800). Constructive levying of war by forcible resistance to execution of a single statute; defendant was convicted and later pardoned, as were defendants convicted in other (unreported) prosecutions. In *U. S.* v. *Marks*, 11 American State Trials (Lawson ed. St. Louis 1916) 175 (Circ. Ct. D. Pa. 1800), the jury was charged on the law of treason as in the other cases, but defendant was acquitted. He later plead guilty to a charge of conspiracy. Defendants Gettman and Hainey were found guilty, however, on a charge to the jury similar to that in the Fries case. Stahler was acquitted, and nolle pros. was entered regarding Desch and Klein, who were held for conspiracy. Carpenter, The Two Trials of John Fries (Philadelphia, 1800) 210–211.

*** *Burr conspiracy: Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554 (U. S. 1807); *U. S.* v. *Burr*, Fed. Cas. Nos. 14,692a and 14,693 (Circ. Ct. D. Va. 1807). Conspiracy

insisted on, though the existence of mixed motives has not sufficed to acquit. The authority seems to weigh against requiring that the overt acts be such as evidence intent; but, in any event, there

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to levy war not within constitutional definition as an overt act of levying war; actual assemblage required. Discharge of prisoners ordered in Bollman case; verdict directed in the Burr trial.

** *U. S.* v. *Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814): Sale of provisions a sufficient overt act; mixture of commercial motive does not make intent sufficient. Acquittal.

** *U. S.* v. *Hodges*, Fed. Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815). Obtaining release of prisoners to the enemy is adhering to the enemy; the act shows the intent. Acquittal.

*** *U. S.* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397 (Circ. Ct. D. Vt. 1808). Organized, armed attack of smugglers on troops enforcing embargo is riot, and not constructive levying of war. Directed verdict.

*** *U. S.* v. *Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628 (Circ. Ct. D. Pa. 1814). Proceeding under flag of truce with enemy detachment to help buy provisions is too remote an act to establish adhering to the enemy. Directed verdict.

*** *U. S.* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105 (Circ. Ct. E. D. Pa. 1851). Participation in forcible resistance to execution of Fugitive Slave Law not constructive levying of war in absence of showing of preconceived plan. Directed verdict.

** *U. S.* v. *Greiner*, Fed. Cas. No. 15,262, 26 Fed. Cas. 36 (E. D. Pa. 1861). Participation as member of state militia company in seizure and holding of a Federal fort for the state is a levying of war sufficient to justify binding accused over to await trial when federal court again sits in the rebel area.

** *U. S.* v. *Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18 (Circ. Ct. N. D. Cal. 1863). Fitting out and sailing a privateer is levying of war. Defendants convicted, later

is a tendency to require a showing that defendant was in fact in a position to do harm. The two-witness requirement has been strictly applied. Per-

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pardoned or released on bond upon taking oath of allegiance.

**Cases of confiscation of property or refusal to enforce obligations given in connection with sale of provisions to the Confederacy. *Hanauer* v. *Doane*, 12 Wall. 342, 20 L. Ed. 439 (U. S. 1871); *Carliste* v. *U. S.*, 16 Wall. 147, 21 L. Ed. 426 (U. S. 1873); *Sprott* v. *U. S.*, 20 Wall. 459, 22 L. Ed. 371 (U. S. 1874); *U. S.* v. *Athens Armory*, Fed. Cas. No. 14,473, 24 Fed. Cas. 878 (N. D. Ga. 1868). Mixed motive, involving commercial profit, does not bar finding of the giving of aid and comfort to the enemy. Other decisions in the Court of Claims are similar.

**U. S. v. *Cathcart and Parmenter*, Fed. Cas. No. 14,756, 25 Fed. Cas. 344 (Circ. Ct. S. D. Ohio, 1864). Motion to quash and demurrer to indictments for treason by levying war denied and overruled, rejecting argument that the union is only a compact of states.

**[*Chenoweth's Case*. [Unreported: see Ex parte Vallandigham, Fed. Cas. No. 16,816, 28 Fed. Cas. 874, 888 (S. D. Ohio 1863); 32 Cong. Globe, Pt. 3, pp. 2166-2167 (37th Cong., 2d Sess.)]: indictment held faulty for alleging aiding and abetting rebels, instead of charging directly the levying of war; in treason all are principals.

*[*Druecker* v. *Salomon*, 21 Wis. 621 (1867). In action for false imprisonment, ruled that detention of defendant lawful because in participating in draft act riot he was guilty of levying war.

***In the matter of *U. S.* v. *Pratt*, 1 Chi. Legal News 401 (1869): Charge of treason by forcing a U. S. guard and killing several persons in its custody is insufficient justification for detention of petitioners in habeas corpus.

***[*Case of Jefferson Davis*, Fed. Cas. No. 3621a, 7 Fed. Cas. 63 (Circ. Ct. D. Va. 1867-1871). Strong arguments were made that treason charges could not properly be brought against those conducting a rebel government which had achieved the status of a recognized belligerent; though the position was not formally conceded, Davis was

haps the outstanding respect in which there has been an inclination to construe the crime broadly was regarding constructive levying of war; but since the

not eventually brought to trial on the indictment for treason. See 2 Warren, Supreme Court in United States History (Rev. ed. Boston, 1934) 485–487; Watson, Trial of Jefferson Davis, (1915) 25 Yale L. J. 669.

***Philippine insurrections, *U. S.* v. *Magtibay*, 2 Philipp. 703 (1903), *U. S.* v. *De Los Reyos*, 3 Philipp. 349 (1904). Mere possession of rebel commissions insufficient overt act; defendants' power insufficient to show overt acts; strict enforcement of two-witness requirement. Convictions reversed. *U. S.* v. *Lagnason*, 3 Philipp. 472 (1904): armed effort to overthrow the government is levying war.

**U. S.* v. *Fricke*, 259 Fed. 673 (S. D. N. Y. 1919). Acts "indifferent" on their face held sufficient overt acts where intent is shown.

***U. S.* v. *Robinson*, 259 Fed. 685 (S. D. N. Y. 1919). Obiter, acts harmless on their face are insufficient as overt acts; two-witness rule requires two witnesses to acts involving commission of the offense. Directed verdict.

**U. S.* v. *Werner*, 247 Fed. 708 (E. D. Pa. 1918), aff'd. 251 U. S. 466, 64 L. Ed. 360, 40 Sup. Ct. 209 (1919). Demurrer to indictment overruled; act indifferent on its face may be sufficient overt act.

***U. S.* v. *Haupt*, 136 F. (2d) 661 (C. C. A. 7th, 1943). Strict application of two-witness requirement and of severance of trial where prejudicial evidence regarding some defendants has no proper bearing on others. Inferentially, however, approves acts harmless on their face as sufficient overt acts. Convictions reversed.

**Stephan* v. *United States*, 133 F. (2d) 87 (C. C. A. 6th, 1943). Acts harmless on their face may be sufficient overt acts; firm ruling on intent. Conviction affirmed. Sentence commuted.

**U. S.* v. *Cramer*, 137 F. (2d) 888 (C. C. A. 2d, 1943). Acts indifferent on their face may be sufficient overt acts. Conviction.

1850's that offense seems in practice to have become a dead-letter, as it has in England.

The language of the constitutional definition of treason does not point up the separate elements

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***U. S.* v. *Leiner*, S. D. N. Y. 1943 (unreported). Acts indifferent on their face are not sufficient overt acts; specific intent must be clearly shown. Directed verdict.

The only reported trials for treason against a state seem to be those of Thomas Wilson Dorr (Rhode Island) and John Brown (Virginia).

**The Trial of Thomas Wilson Dorr, 2 American State Trials, *op. cit. supra*, p. 5 (R. I. Sup. Ct. 1844). Claim to head a state "government" created by extra-legal elections, enforced by armed effort to seize state arsenal. Defendant was convicted, but subsequently pardoned after serving several years in prison.

**The Trial of John Brown, 6 American State Trials, *op. cit. supra*, p. 700 (Jefferson Cty. Circ. Ct. Va. 1859). Armed insurrection "to free slaves" is treason by levying war. Defendant was convicted and executed.

Certain abortive prosecutions for treason are worth noting.

*Indictments were brought against Joseph Smith and other leaders of the Mormons for treason by levying war against the state of Missouri, in 1838; and again, Smith was arrested on such a charge of treason against the state of Illinois, in 1844. Both charges seem severe, since they followed a long history of mutual recrimination and violence between the Mormons and their neighbors; and it seems likely that on a fair trial a limited purpose of self-defense, rather than intent to set up a rival government, could have been made out. See 1 Williams and Shoemaker, History of Missouri (Chicago, 1930) 545; Culmer, New History of Missouri (Mexico, Mo., 1938) 212; 1 Roberts, Comprehensive History of the Church of Jesus Christ of Latter-Day Saints (Salt Lake City, 1930) 499, 500, 529, 530; 2 *id.* 254; Davis, Story of the Church (Independence, Mo., 1943) 244, 283, 305; Ford, History of Illinois (Chicago, 1854) 337; Pease, The Frontier State

of the offense as clearly as it might. In particular, it is unclear in its reference to the overt act, which at first reading might seem introduced merely as a required type of proof of other facts

(Springfield, 1918) 352; Sen. Doc. No. 189, 26th Cong., 2d Sess. (Feb. 15, 1841). The Missouri charge was not pressed at the time, for political reasons, and the defendants escaped, possibly with the connivance of their jailors; later efforts at extradition failed. Smith was murdered by a mob which took him from his cell shortly after his arrest in Illinois.

**Indictments were brought against Mormon leaders for treason by levying war against the United States, in connection with activities taken to resist Federal troops, in Utah, in 1856–1857; but these charges were immediately nullified by the general pardon granted by President Buchanan. Even the official history of the Church recognizes that, "strictly speaking", there was a levying of war in this case. 4 Roberts, *op. cit. supra*, pp. 412–413, 425; see Anderson, Desert Saints (Chicago, 1942) 188.

*Under a strongly partisan charge by the Chief Justice of Pennsylvania, who took the unusual action of addressing a local Grand Jury, indictments for treason by levying war against the state of Pennsylvania were returned in 1892 against leaders of the Homestead Strike. *Commonwealth v. O'Donnell*, 12 Pa. Co. 97 (O. & T. Allegheny Cty. 1892). The action was subjected to severe criticism, from conservative professional sources, as well as from labor sympathizers; and the prosecutions were quietly dropped after three of the defendants had been acquitted of charges of murder growing out of the clash with the Pinkerton detectives. See notes 110–112, *infra*.

There have also, of course, been many trials by military tribunals on charges amounting to treason: Apart from the issue of free speech involved in the Vallandigham case (*) [see The Trial of Clement L. Vallandigham, 1 American State Trials (Lawson, ed. St. Louis, 1914) 699], the principal cases seem to have involved conduct clearly within strict definitions of the scope of "treason", and the principal issue has concerned the extent of mili-

constituting the crime.[28] It has been noted, however, that the constitutional history indicates that, consistent with familiar English doctrine, an overt act was intended to be shown as a separate and distinct element of the offense itself. Without material exception, the American opinions have so referred to the overt act, and to the intent, as distinct elements of the crime.[29] Typical of the

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tary jurisdiction. See, *e. g.*, regarding the "Northwest Confederacy conspiracy", Pitman, The Trials for Treason at Indianapolis (Cincinnati, 1865); Klaus, ed., The Milligan Case (N. Y. 1929) 24; Milton, Abraham Lincoln and the Fifth Column (N. Y. 1942) 170 and Ch. 8. *Cf.* Ex parte Quirin, 317 U. S. 1 (1942).

Charges of treason were found improperly laid against a state where the accused was deemed to have acted rather against his allegiance to the United States, in *People* v. *Lynch*, 11 Johns. 549 (N. Y. 1814) (**) and in Ex parte Quarrier, 2 W. Va. 569 (1866) (**). The conduct involved was in each case within the most strict definition of treason.

[28] This difficulty was noted, and found not substantial, in a discussion of the elements of "treason", in *Wimmer* v. *U. S.*, 264 Fed. 11, 13 (C. C. A. 6th, 1920), cert. den. 253 U. S. 494. (Second Espionage Act):

> The requirement that there shall be two witnesses is purely evidential, but when the requirement is extended to proof of the overt act, it becomes clear that there must be an overt act to contribute the crime, and the act is incorporated into the definition.

[29] Charge to jury by Paterson, Circ. J., in *U. S.* v. *Mitchell*, Fed. Cas. No. 15, 788, 26 Fed. Cas. 1277, 1280 (Circ. Ct. D. Pa. 1795); charge by Iredell, Circ. J., to Grand Jury in connection with Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 840 (Circ. Ct. D. Pa. 1799); Peters, D. J., in colloquies with counsel on first trial of Fries, *id.*, 891 and 916; charge to jury by Iredell, Circ. J., in same, *id.*, 914; and by Peters, D. J., *id.*, 909; charge

approach is the charge to the jury by Paterson, Circuit Justice, in *United States* v. *Vigol*:

> The first point for consideration is the evidence which has been given to establish the case stated in the indictment [in context, this refers to the overt act alleged]; the sec-

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to jury by Chase, Circ. J., in second trial of Fries, Fed. Cas. No. 5127, 9 Fed. Cas. 924, 931 (Circ. Ct. D. Pa. 1800); *Ex parte Bollman*, 4 Cranch 75, 126, 2 L. Ed. 554, 571 (U. S. 1807); *U. S.* v. *Burr*, Fed. Cas. No. 14,692a, 25 Fed. Cas. 2, 13–14 (Circ. Ct. D. Va. 1807) (on motion to commit), and Fed. Cas. No. 14,693, *id.*, 55, 168, 169 (direction to jury); *U. S.* v. *Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814); *U. S.* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 399, 400 (Circ. Ct. D. Vt. 1808); *U. S.* v. *Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628, 630 (Circ. Ct. D. Pa. 1814); Story, Circ. J., in charge to Grand Jury, Fed. Cas. 18,275, 30 Fed. Cas. 1046 (Circ. Ct. D. R. I. 1842); Sprague, D. J., in charge to Grand Jury, Fed. Cas. No. 18,263, 30 Fed. Cas. 1015, 1016 (D. Mass. 1851); Kane, D. J., in charge to Grand Jury, Fed. Cas. No. 18,276, 30 Fed. Cas. 1047, 1048 (Circ. Ct. E. D. Pa. 1851); Grier, Circ. J., in charge to jury in *U. S.* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105,126 (Circ. Ct. E. D. Pa. 1851); *U. S.* v. *Greiner*, Fed. Cas. No. 15,262, 26 Fed. Cas. 36, 39 (E. D. Pa. 1861); Field, Circ. J., in charge to jury, in *U. S.* v. *Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 22 (Circ. Ct. N. D. Cal. 1863); Mayer, D. J., in charge to jury in *U. S.* v. *Fricke*, 259 Fed. 673, 677 (S. D. N. Y. 1919); Learned Hand, D. J., on motion to direct a verdict in *U. S.* v. *Robinson*, 259 Fed. 685, 690 (S. D. N. Y. 1919); *U. S.* v. *Werner*, 247 Fed. 708, 709–710 (E. D. Pa. 1918); trial court charge in *U. S.* v. *Stephan*, 50 Fed. Supp. 740, 742–743, note (E. D. Mich. 1943) [charge approved, 133 F. (2d) 87, 99 (C. C. A. 6th, 1943)]; U. S. v. Cramer, 137 F. (2d) 888, 893 (C. C. A. 2d, 1943); *U. S.* v. *Magtibay*, 2 Philipp. 703, 705 (1903); *U. S.* v. *De Los Reyes*, 3 Philipp. 349, 351 (1904); In Riots of 1844 (charge to

> and point turns upon the criminal intention of the party; and from these points, the evidence and the intention, the law arises. With respect to the evidence, the current runs one way. * * * [summarizing the assembling in force, marching, etc.] * * *

Grand Jury by King, P. J.), 4 Pa. Law Jour. Rep. 29, 35, quoted also at 26 Fed. Cas. 116.

Two cases deviate from the standard distinction of the intent and act elements of the crime. In *U. S.* v. *Hodges*, Fed. Cas. No. 15,374; 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815), defendant was indicted for adhering to the enemy by procuring the release of British prisoners by his fervent representations to the guards of British threats to burn his home village in retaliation. Both Duval, Circ. J., and Houston, D. J., agreed that the judgment on the law as well as on the facts was for the jury. But in his charge, Mr. Justice Duval treated the overt act here charged as itself conclusive evidence of the intent:

> First, Hodges is accused of adhering to the enemy, and the overt act laid consists in the delivery of certain prisoners, and I am of opinion that the overt act laid in the indictment and proved by the witness is high treason against the United States.
>
> Second: When the act itself amounts to treason it involves the intention, and such was the character of this act. No threat of destruction of property will excuse or justify such an act; nothing but a threat of life, and that likely to be put into execution.

Houston, D. J., said that he did not "entirely agree" with the chief justice on these points, but did not specify further his disagreement. The jury acquitted. Duval's charge seems to state an unnecessarily mechanical rule, turning on the showing of an act which "itself amounts to treason"; the facts seem to present the more familiar situation of mixed motives, and the jury might have been charged in conventional terms that defendant cannot escape the plain consequences of his conduct by pleading a personal motive therefor. *Cf.* note 98, infra. The jury's acquittal probably

With respect to the intention, likewise, there is not, unhappily, the slightest possibility of doubt. To suppress the office of excise, in the Fourth survey of this state, and particularly, in the present instance, to compel the resignation of Wells, the excise officer, so

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represents a de facto rule recognizing an excuse which legal doctrine would find it dangerous to crystallize.

In *U. S.* v. *Haupt*; 136 F. (2d) 661, 665 (C. C. A. 7th, 1943), rev'g 47 Fed. Supp. 836 (N. D. Ill. 1942), the court rejected defendants' argument that the indictment had improperly joined different offenses, since different overt acts of aid and comfort were alleged, in which not every defendant was charged to have participated. The court said that

> The constitutional requirement "of two Witnesses to the same overt Act" forms no part of the definition of the offense. It relates solely to the proof required before a conviction can be had. The crime itself may be established in the same manner as any other crime, but before there can be a conviction, an act in its promotion must be established by two witnesses. In other words, the two-witness provision of the Constitution is an evidential requirement prerequisite to conviction. Moreover, the constitutional requirement "of two Witnesses to the same overt Act" appears to be an implied recognition that there may be more than one act committed in the execution of the offense. Otherwise, use of the word "same" would seem to be superfluous.

The court cites nothing but the words of the constitutional provision for its argument; and on this basis alone, its contention seems extreme, in view of the plain implication of overt acts in the "levying" of war and the "giving aid and comfort". Further, as has been noted, the history of the successive drafts of the treason clause in the Convention reflects an understanding that the crime included a distinct act element. See note 28, *supra*. On the merits, the court's ruling is open to question; and that the court had some question of it itself is indicated by its caution

> as to render null and void, in effect, an act of congress, constituted the apparent—the avowed—object of the insurrection * * *. Combining these facts, and this design, the crime of high treason is consummate * * *."

What is meant, concretely, when the opinions say that the intent and the act are "separate" ele-

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that if its ruling on the indictment leaves the door open to unfairness, this may be dealt with at the trial stage by allowance of motions for separate trials. In fact, the court reversed in this case because it felt that the trial court had abused its discretion by denying such severance after the evidence for the prosecution was in and showed considerable variations in the charges proven in connection with various defendants. In the context of the history of the case as a whole, the court's ruling thus takes on the character of an awkward rationalization employed to dispose of a point of pleading.

The opinion of Learned Hand, D. J., in *U. S. v. Robinson*, 259 Fed. 685 (S. D. N. Y. 1919) does not deny, but rather firmly asserts, according to its own theory, the separate character of the intent and act elements, insisting that the requisite act should be more than such as merely makes out an attempt. Thus at 259 Fed. 685, 690, he argues that in the charge of adhering to enemies,

> Strictly, no overt act should have been held sufficient which merely manifested a traitorous intent, because the treason lay in hostile acts, for the words "adhering" must be taken as defined by the phrase "giving aid and comfort." It was hardly the purpose of the 25th of Ed. III to allow the treason of levying war or of adhering to the enemy to be proved merely as attempt; nor is there a sound reason for supposing that the overt act was meant only to disclose a traitorous intent in treasons which involved more than intent.

[30] Fed. Cas. No. 16,621, 28 Fed. Cas. 376 (Circ. Ct. D. Pa. 1795).

ments of the crime? As Mr. Justice Paterson's charge implies, this must mean, as a minimum, that the prosecution has the burden of producing adequate evidence to establish two propositions—one concerning a state of mind, and one concerning, at least in the first instance, something else called an "overt act". It is conceivable that the same evidence might establish both propositions, though in none of the American prosecutions does it appear that the government relied on such single, double-duty proof.[31] Indeed, since the law, even in treason, recognizes the defense of duress under immediate threat to life, it seems possible always to cast doubt on the sufficiency of the most conclusive-appearing evidence of treasonable conduct.[32] But, in any event the decisions make it clear that, however clear the evidence of the one element, if the evidence does not establish beyond a reasonable doubt the existence of the other, the prosecution fails. Thus, though it be assumed that there is incontrovertible evidence of treasonable

[31] The case against Jefferson Davis may have been shaping up this way. See Fed. Cas. No. 3621a, 7 Fed. Cas. 63 (Circ. Ct. D. Va. 1867–1871).

[32] See *Respublica v. M'Carty*, 2 Dall. 86, 1 L. Ed. 300 (Pa. Oyer and Terminer, 1781); *U. S. v. Hodges*, Fed. Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815). There may be room for argument whether the prosecution's burden of proof does not include the issue of duress, at least if the defendant has gone forward with some evidence on the point, but even without this factor, the fact that the defense is recognized at all may cast doubt on the "intrinsic" character of the most treasonable appearing conduct. *Cf.* 9 Wigmore on Evidence (3d ed. Boston 1940) sec. 2512, especially note 4.

plotting to subvert the government, a conspiracy to levy war is not treason within the constitutional definition, says Mr. Chief Justice Marshall, because plotting does not amount to a sufficient overt act within the meaning of that branch of the crime:

> To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action, by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed.[33]

On the other hand, where there was a clear overt act of armed resistance to constituted authority—

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[33] *Ex parte Bollman*, 4 Cranch 75, 126, 2 L. Ed. 554, 571 (U. S. 1807). See charge to jury by Peters, D. J., in first trial of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 909 (Cir. Ct. D. Pa. 1799), and charge of Chase, Circ. J., on second trial, Fed. Cas. No. 5127, id., 924, 931 Livingston, Circ. J., in charge to jury in *U. S.* v. *Hoxie*, Fed Cas. No. 15,407, 26 Fed. Cas. 397, 398; charge to Grand Jury, by Story, Circ. J., Fed. Cas. No. 18,275, 30 Fed. Cas. 1046, 1047; charge to Grand Jury, by Sprague, D. J., Fed. Cas. No. 18,263, 30 Fed. Cas. 1015 (D. Mass. 1851); charge to jury by Grier, Circ. J., in *U. S.* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105,127 (Circ. Ct. E. D. Pa. 1851); charge to Grand Jury, by Nelson, Circ. J., Fed. Cas. No. 18,271, 30 Fed. Cas. 1034, 1035 (Circ. Ct. S. D. N. Y. 1861) charge to Grand Jury, by Leavitt, D. J., Fed. Cas. No. 18,272, 30 Fed. Cas. 1036, 1037 (S. D. Ohio, 1861); *cf. Wimmer* v. *U. S.*, 264 Fed. 11, 13 (C. C. A. 6th, 1920), cert. den., 253 U. S. 494.

as by an armed clash with government troops seeking to enforce an embargo, or a forcible resistance to the execution of the Fugitive Slave Law—verdicts were nevertheless directed, because the Circuit Justices presiding found that evidence of treasonable intention was lacking, or that at least the evidence was ambiguous whether force was not applied for particular or private purposes and hence would not sustain the prosecution's burden of proof.[34] The distinct character of the intent and act elements of the crime is further reflected in rulings that, since each must equally be established, it is in the discretion of the prosecutor which he seeks to prove first.[35] If one of the two elements were merely corroborative of the other, it would plainly be improper and capable of prejudicial effect on the defendant's rights, to permit the prosecutor to prove the corroborative fact before establishing the fact corroborated. So Mr. Chief Justice Marshall analyzed the problem when, as presiding Justice in

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[34] *U. S.* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397 (Circ. Ct. D. Vt. 1808); *U. S.* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105 (Circ. Ct. E. D. Pa. 1851); *cf. U. S.* v. *Leiner*, Cr. No. 113-120, S. D. N. Y., 1943 (unreported), reprinted in Petitioner's Brief, *U. S.* v. *Cramer*, U. S. Sup. Ct. October Term, 1943, p. 47.

[35] *U. S.* v. *Burr*, Fed. Cas. No. 14,692h, 25 Fed. Cas. 52, 54 (Circ. Ct. D. Va. 1807); *U. S.* v. *Lee*, Fed. Cas. No. 15,584 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814); The Trial of Thomas Wilson Dorr, 2 American State Trials (Lawson ed. St. Louis 1914) 5, 22 (R. I. Sup. Ct. 1844), Pitman, Report of the Trial of Thomas Wilson Dorr (Boston, 1844) 22, 25, Turner and Burges, Report of the Trial of Thomas Wilson Dorr (Providence, 1844) 10; *cf. U. S.* v. *Fricke*, 259 Fed. 673, 675 (S. D. N. Y. 1919).

the Burr trial, he permitted the prosecution to proceed with evidence of intent before the act charged in the indictment had been established:

> It has been truly stated that the crime alleged in the indictment consists of the fact, and of the intention with which that fact was committed. The testimony disclosing both the fact and the intention must be relevant. The court finds no express rule stating the order in which the attorney is to adduce relevant testimony, nor any case in which a court has interfered with the arrangement he has made. No alteration of that arrangement, therefore, will now be directed. But it is proper to add that the intention which is considered as relevant in this stage of the inquiry is the intention which composes a part of the crime, the intention with which the overt act itself was committed—not a general evil disposition, or an intention to commit a distinct fact. This species of testimony, if admissible at all, is received as corroborative or confirmatory testimony. It does not itself prove the intention with which the act was performed, but it renders other testimony probable which goes to that intention. It is explanatory of, or assistant to, that other testimony. Now it is essentially repugnant to the usages of courts, and to the declarations of the books by whose authority such testimony is received, that corroborative or confirmatory testimony should precede that which it is to corroborate or confirm. Until the introductory testimony be given, that which is merely corroborative is not relevant, and of consequence, if objected to, cannot be admitted without violating the best settled rules of evidence.

> This position may be illustrated by a direct application to the testimony of General Eaton. So far as his testimony relates to the fact charged in the indictment, so far as it relates to levying war on Blennerhassett's island, so far as it relates to a design to seize on New Orleans, or to separate by force the Western from the Atlantic states, it is deemed relevant and is now admissible. So far as it respects other plans to be executed in the city of Washington, or elsewhere, if it indicate a treasonable design, it is a design to commit a distinct act of treason, and is therefore not relevant to the present indictment. It can only, by showing a general evil intention, render it more probable that the intention in the particular case was evil. It is merely additional or corroborative testimony, and, therefore, if admissible at any time, is only admissible according to rules and principles which the court must respect, after hearing that which it is to confirm.[36]

The fact that the intent and the act elements are thus distinct, so that the prosecution must equally establish each to make out its case, in itself carries some suggestion that these propositions are required to be established for different reasons of policy. If these two elements perform different functions, it follows that the evidence sufficient to establish one may not necessarily be required to be of a character relevant to establishing the other. As an *a priori* matter, it may of course also be argued that both elements are designed,

[36] *Loc. cit. supra*, note 35, p. 54. See 7 Wigmore on Evidence (3d ed. Boston, 1940) sec. 2038, praising the "lucid opinion by Marshall, C. J."

ultimately, to prove the intent, which is the basic factor which may make the accused a dangerous man; and that it would not be irrational, in promotion of the obvious concern of the framers to safeguard the rights of the accused, if the "overt act" was intended to be such as would offer corroborative evidence of the intent. It may fairly be urged that men in all ages would be perfectly willing to punish one whom they were sure was adhering to the state's enemies by treacherous thoughts; that the practical problem is one of securing adequate proof to assure against abusive prosecutions of the innocent; and that, hence, if the overt act element is construed to require proof which will provide cumulative evidence of intent, this is not to say that the overt act requirement is rendered meaningless.[37] Whatever the persuasiveness of this latter analysis, certainly it must carry the burden of proof, for by familiar principles of construction, distinct elements in a constitutional, legislative or judge-made rule of law are to be taken *prima facie* as intended to serve distinct purposes.[38] Further, if the evidence to establish the overt act is required to be such as will corroborate the existence of the intent, it is

[37] Obviously, this suggested analysis has some analogy to the argument of Judge Learned Hand, in *U. S.* v. *Robinson*, 259 Fed. 685 (S. D. N. Y. 1919). But, as was pointed out in note 29, *supra*, Judge Hand's position does not really mingle the intent and act elements, but insists on a more rigorous demonstration of a completed act of "levying" or "adhering" and an avoidance of rulings which would make treason a type of attempt.

[38] See Marshall, C. J., in *Marbury* v. *Madison*, 1 Cranch 137, 174, 2 L. Ed. 60, 72 (U. S. 1804).

difficult to understand the decisions which so rigorously insist on full proof of each element, acquitting defendants whose intent is assumed treasonable but who have not been shown guilty of an "overt act." Likewise it is hard to see how it can be said to be immaterial which element of the crime is proved first, if one is corroborative of the other.[39] The proponents of the latter analysis may fairly point out that in the cases so ruling on the order of proof the issues arose because the prosecution sought first to introduce its evidence on intent, and that it is hence wholly consistent with a corroborative function of the act element to introduce the principal evidence on intent first. But the rulings make no such distinction, and Mr. Chief Justice Marshall plainly says that there is nothing inherent in either element to give it priority in order of proof. Indeed, his observation takes on greater force when one recalls that it was made in answer to the contention that the *act* must be proved first.

More direct evidence of the nature of the overt act, and hence of the kind of proof necessary to make it out, may be found in what the courts have to say about the function of this element of the crime. What is the purpose or policy in requiring a showing of an "overt act"? Some indication is conveyed when, in *United States* v. *Mitchell*, Mr. Justice Paterson approvingly cites Foster to the effect that, as an overt act of levying of war, "the very act of marching is considered as carrying the traitorous intention into

[39] See notes 33–36, *supra*.

effect * * *"[40] Charging the Grand Jury which was investigating the property tax disturbances of 1799, Mr. Justice Iredell observed that

> if * * * the intention was to prevent by force of arms the execution of any act of the congress of the United States altogether (as for instance the land tax act, the object of their opposition), any forcible opposition calculated to carry that intention into effect, was a levying of war against the United States, and of course an act of treason."[41]

And in the first trial of Fries, resulting from this investigation, Judge Peters told the jury concerning the alleged forcible rescue of prisoners in custody of the United States marshal, that

> Indeed, the treason would be complete, by the conspiracy, in any part of the district, to commit the treasonable act at Bethlehem, if any had, in consequence of the conspiracy, marched or committed any overt act for the purpose, though the actual rescue had not taken place. So we thought in the Cases of the Western Insurgents [See *U. S.* v. *Vigol*, Fed. Cas. No. 16,621, 28 Fed Cas. 376; *U. S.* v. *Mitchell*, Fed. Cas. No. 15,788, 26 *id.* 1277], that the treason, concocted at Couche's Fort, would have been complete, if any had only marched to commit the crime; though the design had not arrived

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[40] Fed. Cas. No. 15,788, 26 Fed. Cas. 1277, 1280 (Circ. Ct. D. Pa. 1795).

[41] Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 840 (Circ. Ct. D. Pa. 1799); see also Chase, Circ. J., in charge to jury on second trial of Fries, Fed. Cas. No. 5127, *id.* 924, 931 (Circ. Ct. D. Pa. 1800).

to the disgraceful catastrophe it finally attained.[42]

In the second trial of Fries, Mr. Justice Chase charged that

> * * * if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, * * * they are only guilty of a high misdemeanour; but if they proceed to carry such intention into execution by force, * * * they are guilty of the treason of levying war, and the quantum of the force employed neither lessens nor increases the crime * * * a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used, in pursuance of such design to levy war; but * * * it is altogether immaterial whether the force used is sufficient to effectuate the object—any force connected with the intention will constitute the crime of levying war.[43]

To the same effect, of course, is Marshall's famous ruling on conspiracy to levy war in *Ex parte Bollman*, which has already been quoted.[44] The underlying thought emerges still more sharply in

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[42] Fed. Cas. No. 5126, 9 Fed. Cas. 826, 909; *cf.* Iredell, Circ. J., 914.

[43] Fed. Cas. No. 5127, 9 Fed. Cas. 924, 931.

[44] See note 33, supra; *U. S. v. Burr*, Fed. Cas. No. 14692a, 25 Fed. Cas. 2, 13–14 (Circ. Ct. D. Va. 1807), and Fed. Cas. No. 14693, *id.*, 55, 168. All of the rulings and dicta refusing to recognize a conspiracy as a sufficient overt act of levying war, cited in note 33, contain similar language or implications.

United States v. *Pryor*, where Mr. Justice Washington told the jury that the mere setting out in search of provisions to be turned over ultimately to the enemy did not seem to him a sufficient overt act of adherence:

> * * * the law does not constitute such an act treason, even although these motives [of ransoming himself and fellow prisoners] had not existed; and, although intentions and feelings as disloyal as ever stained the character of the most atrocious traitor, were proved against the prisoner. Can it be seriously urged, that if a man, contemplating an adherence to the enemy, by supplying them with provisions, should walk towards the market-house to purchase, or into his own fields to slaughter whatever he might find there, but should, in fact, do neither one or the other of the intended acts, he has committed an overt act of adhering to the enemy? Certainly not. All rests in intention merely, which our law of treason in no instance professes to punish. Carrying provisions toward the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different from the act of going in search of provisions for such a purpose, and stopping short before any thing was effected, and whilst all rested in intention. * * *[45]

Charging the Grand Jury in Rhode Island, with the memories of Dorr's Rebellion fresh in mind, Mr. Justice Story again stated the now familiar relation between act and intention:

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[45] Fed. Cas. No. 16,096, 27 Fed. Cas. 628, 630 (Circ. Ct. D. Pa. 1814).

> To constitute an actual levy of war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them with force to execute, or towards executing, that purpose. * * * If the assembly is arrayed in a military manner,—if they are armed and march in a military form, for the express purpose of overawing or intimidating the public,—and thus they attempt to carry into effect the treasonable design,—that will, of itself, amount to a levy of war, although no actual blow has been struck, or engagement has taken place. This is a clear case * * *[40]

To the same effect are the numerous charges to grand and petit juries occasioned by disturbances against the Fugitive Slave Law and the outbreak of the Civil War.[41] In *United States* v. *Fricke*, in 1919, Judge Mayer continued the theme, in telling the jury that

> An overt act in itself may be a perfectly innocent act standing by itself; it must be

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[40] Fed. Cas. No. 18,275, 30 Fed. Cas. 1046, 1047 (Circ. Ct. D. R. I. 1842).

[41] Charge to Grand Jury, Fed. Cas. No. 18,263, 30 Fed. Cas. 1015 (D. Mass. 1851); same, Fed. Cas. No. 18,276, *id.*, 1047 (Circ. Ct. E. D. Pa. 1851); *U. S.* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105 (Circ. Ct. E. D. Pa. 1851); Charge to Grand Jury, Fed. Cas. No. 18,269, 30 Fed. Cas. 1024 (D. Mass. 1851); *U. S.* v. *Greiner*, Fed. Cas. No. 15,262, 26 Fed. Cas. 36 (E. D. Pa. 1861); *U. S.* v. *Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18 (Circ. Ct., N. D. Cal. 1863); Charge to Grand Jury, Fed. Cas. No. 18,271, 30 Fed. Cas. 1034 (Circ. Ct. S. D. N. Y. 1861); same, Fed. Cas. No. 18,272, 30 Fed. Cas. 1036 (Circ. Ct. S. D. Ohio, 1861); *cf.* 10 Op. Atty. Gen. 513 (1863).

> in some manner in furtherance of the crime * * * a person cannot be convicted of treason merely for having the intention in his own mind to adhere to and give aid and comfort to the enemy. This intention must be manifested by what is termed an overt act.[48]

In *United States* v. *Robinson,* Judge Learned Hand insists that if the law had continued its development along proper lines, the act in adherence should have to amount to a giving of aid and comfort, and not merely an attempt; and otherwise his conception of the proper distinction of act and intent follows the familiar pattern in pointing out that it is of the nature of the "overt act" that it constitutes a translation of intent into execution:

> Strictly no overt act should have been held sufficient which merely manifested a traitorous intent, because the treason lay in hostile acts, for the words "adhering" must be taken as defined by the phrase "giving aid and comfort". It was hardly the purpose of the 25th of Ed. III to allow the treason of levying war or of adhering to the enemy to be proved merely as attempt; nor is there a sound reason for supposing that the overt act was meant only to disclose a traitorous intent in treason which involved more than intent. Probably the analogy with compassing confused the subject, but, whatever the cause, it was decided before the end of the seventeenth century (Lord Preston's Case, 12 How. St. Tr. 646) that aid and comfort need not reach the enemy, and that, though the accused were frustrated in his attempt,

[48] 259 Fed. 673, 677 (S. D. N. Y. 1919).

> it was enough if the overt act declared his intent. This has since remained the law. * * *[39]

In the light of what he deemed the proper doctrine, Judge Hand's further ruling, raising the question whether the act laid may be "a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent", seems a deliberate deviation from the accepted analysis in order to limit the effect of what he deemed to be itself a departure from sound principle. Certainly, the familiar analysis is once more in the background of those contemporary decisions refusing to concede that "mere words", however treasonable the intent evidenced therein, could constitute treason within the constitutional definition, because they do not amount to sufficient execution of the thought.[40] Bringing the story up to date,

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[39] 259 Fed. 685, 690 (S. D. N. Y. 1919).

[40] *Frohwerk* v. *U. S.*, 249 U. S. 204, 210 (1919); *Winner* v. *U. S.*, 264 Fed. 11, 13 (C. C. A. 6th, 1920), cert. den. 253 U. S. 494; *Equi* v. *U. S.*, 261 Fed. 53 (C. C. A. 9th, 1919), cert. den. 251 U. S. 560, 64 L. Ed. 414, 40 Sup. Ct. 219; *Lockhart* v. *U. S.*, 264 Fed. 14, 17 (C. C. A. 6th, 1920), cert. den. 254 U. S. 645, 65 L. Ed. 455, 41 Sup. Ct. 14; *Schaberg* v. *U. S.*, 264 Fed. 1, 7 (C. C. A. 6th, 1920); *State* v. *M'Donald*, 4 Port. 449 (Ala. 1837); *People* v. *Steelik*, 187 Cal. 361, 203 Pac. 78 (1919); *Taylor* v. *State*, 194 Miss. 1, 11 So. (2d) 663, rev'd on other grounds, 319 U. S. 583, 87 L. Ed. 1600, 63 Sup. Ct. 1200 (1943); *Berg* v. *State*, 29 Okla. Cr. Rep. 112, 233 Pac. 497 (Okla. Cr. Ct. App. 1925), with which compare separate opinion of Doyle, J., in Ex parte Wood, 110 P. (2d) 304, 309 (Okla. Cr. Ct. App. 1941); *State* v. *Laundy*, 103 Ore. 443–460, 204 Pac. 958, 964 (1922); *State* v. *Hennessy*,

one may note that in *United States* v. *Haupt*, the jury was instructed that

> Any intentional act or acts furthering the hostile designs of the enemies of the United States gives aid and comfort and constitutes

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114 Wash. 351, 195 Pac. 2f1 (1921); *cf. People* v. *Lloyd*, 304 Ill. 23, 136 N. E. 505 (1922).

The only adequate analysis supporting the proposition of these cases, that the espionage acts do not violate the limitation of the treason clause by creation of what is in effect a new branch of treason, is in *Wimmer* v. *U. S.*, 264 Fed. at 12. The court's argument not only treats the act and intent elements as distinct requisites of the prosecution's case, but also indicates that the court saw the function of the act element to be, not that of corroborating the existence of the intent, but of showing that there was also a will-to-act, a putting of the thought into execution:

> Here the only conduct alleged or proved, as making out the offense, consisted of oral statements—words only. It is well settled that one cannot, by mere words, be guilty of treason * * * and thus the fallacy of Wimmer's contention becomes apparent. It is a mistake to say that the intent is the thing which makes the treason, and that where the disloyal intent is there treason is. The requirement that there shall be two witnesses is purely evidential, but when the requirement is extended to proof of the overt act, it becomes clear that there must be an overt act to constitute the crime, and the act is incorporated into the definition. Thus, we find, in the constitutionally defined crime, two elements, the intent and the act; neither is dominant. Intent minus act is not treason, any more than act minus intent is. Since it was declared by Chief Justice Marshall in the Bollman Case, 4 Cranch 75, 2 L. Ed. 554, it has never been doubted that Congress may punish, under the ordinary rules of prosecution and without trenching upon the constitutional limitation as to treason, acts which are of a seditious

> adhering to such enemies. * * * An overt act, in criminal law, is an outward act done in pursuance and in manifestation of an intent or design; an overt act in this case means some physical action done for the purpose of carrying out or of affecting the treason. [sic].[51]

and in *United States* v. *Stephan*, the charge likewise clearly declared that "The overt act is the doing of some actual act, looking towards the accomplishment of the crime."[52]

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nature and tend toward treason, but which are not of the direct character and superdangerous degree which would meet the constitutional test and make them treason; and even more must this be true of words.

Further distinction is found in the very words of the constitutional definition. Treason is "adhering to their enemies, giving them aid and comfort." Both adherence and giving aid are necessary. To "favor or support" is very likely to "adhere"; but it does not carry the idea of giving aid and comfort, unless by a rather remote complication. Hence it may well be said that adherence by words only is an offense quite distinct from treason.

Whether or not the court's position is regarded as sound on the merits of the constitutional question [see Anderson, J., dissenting in *Taylor* v. *State*, 194 Miss. 54–57, 11 So. (2d) 663, 681–682 (1943)], it is clear what is its understanding of the relation of the act and intent elements, and its position therein is consistent with the almost unanimous authority of the American cases.

[51] 47 Fed. Supp. 836, 839 (N. D. Ill. 1942). No criticism was expressed of this part of the charge, on reversal. 136 F. (2d) 661 (C. C. A. 7th, 1943).

[52] 50 Fed. Supp. 738, 742–743, note. This charge was approved in its entirety on appeal, 133 F. (2d) 87, 99 (C. C. A. 6th, 1943). And compare, of course, *Cramer* v. *U. S.*, 137 F. (2d) 888, 894.

It thus appears that, with remarkable unanimity—the more impressive because the characteristic succinctness of the statements reflects an absence of any questioning of the point—the judges have stated the function of the overt act element of the crime as consisting in the demonstration that the defendant has moved from the realm of thought, plan, ideas or opinions, into the world of action. The overt act is to show that defendant has done something about what he has in his mind. In more positive terms of the underlying policy, the function of the overt act element is to prevent the punishing of men as traitors for their thoughts alone. This is expressed in the passage already quoted from *United States* v. *Pryor*.[53] In a charge to the Grand Jury, in 1861, Judge Leavitt declared that the required overt act must be "of a character susceptible of clear proof, and not resting in mere inference or conjecture", and explained that the purpose of the requirement was

> to exclude the possibility of a conviction * * * upon proof of facts which were only treasonable by construction or inference, or which have no better foundation than mere suspicion. * * * Hence, it will be obvious that however strong may be the grounds of suspicion or belief, that an individual is disloyal to his country or his government, until his disloyalty is developed by some open and provable act, he is not legally guilty of the crime of treason. And it follows, also, that mere expressions of opinion indicative of sympathy with the

[53] See note 45, *supra*; cf. *U. S.* v. *Burr*, Fed. Cas. No. 14,692a, 25 Fed. Cas. 2, 13–14 (Circ. Ct. D. Va. 1807).

> public enemy, will not ordinarily involve the legal guilt of that crime. * * *[54]

As Judge Leavitt's charge suggests, the overt act requirement in "treason" may, because of the political character of the crime, involve elements of policy additional to those considerations which in the criminal law generally require an act as well as intent to establish guilt. The charge to the jury by Judge Mayer in *United States* v. *Fricke* makes this more explicit, and links the function of the overt act to the policies favoring free speech and thought and the protection of the individual against public prejudice which we have previously noted as bases for the general restrictive policy represented by the constitutional definition of treason. Judge Mayer's comments are important enough to justify quoting them in full, at the expense of some repetition:

> Naturally passion is high; patriotic men and women are concerned with the safety of their country; and in the excitement it is but human nature sometimes to lose sight of the calm requirements of the law, and convict, as the expression goes, on general principles; and so, to safeguard against anything of that kind, and in order to prevent the conviction of any man for what he had in his mind, as distinguished from what he did, the constitutional provision as to an overt act was inserted; * * * An overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime * * * a person cannot be convicted of treason

[54] Fed. Cas. No. 18,272, 30 Fed. Cas. 1036, 1037 (Circ. Ct. S. D. Ohio, 1861).

> merely for having the intention in his own mind to adhere to and give aid and comfort to the enemy. This intention must be manifested by what is termed an overt act.[55]

The function of the overt act, to demonstrate that intent has been put into execution, is plainly stated in the charge to the jury approved by the Sixth Circuit Court of Appeals in *United States* v. *Stephan*, though here the basis of the doctrine is identified with the general policy of the criminal law:

> An overt act means something more than what is in the mind. We get the problem of an overt act in connection with a number of different crimes. For instance, it isn't right for two men to get their heads together to rob this post office to-night, but, so far as the federal law is concerned, not a single thing could be done about it because there has been no overt act; but just as soon as one or more of them did a single thing looking towards the accomplishing of that, like going and getting a revolver, a flash light, a jimmy, or some dynamite, an overt act has been done, and the conspiracy can be punished. I mention that so that you will know what I mean by an overt act. The overt act is the doing of some actual act, looking towards the accomplishment of the crime.[56]

Judge Learned Hand's holding, in *United States* v. *Robinson*, appears to be the only considered

[55] 259 Fed. 673, 677 (S. D. N. Y. 1919).

[56] 50 Fed. Supp. 738, 742-743, note (E. D. Mich. 1943), approved, 133 F. (2d) 87, 99 (C. C. A. 6th, 1943).

statement advancing a different explanation of the function of the overt act element.[57] As has been

[57] Judge Hand directed a verdict in U. S. v. Robinson, 259 Fed. 685, 694 (S. D. N. Y. 1919), ruling that

> * * * it is necessary to produce two direct witnesses to the whole overt act. It may be possible to piece bits together of the overt act, but, if so, each bit must have the support of two oaths; on that I say nothing. In the case of none of the overt acts at bar was the necessary evidence produced. The gravamen of the charge depended for direct support on Victorica alone. For the rest, the case rested upon circumstantial evidence, which, while well-nigh conclusive in fact, was not direct as required * * *

At page 690 he states that the third overt act of the first count "is good as a pleading under any rule", including his suggested doctrine, that the overt act must "openly manifest" treason. In his description, (p. 686):

> The third overt act [of the first count] was that on June 6, 1917, defendant embarked from the city of Rotterdam bound for New York, carrying with him the reply messages heretofore described, with intent to convey these to the agents of the German government, Victorica, Wessels, Ryan, and O'Leary, and with intent to act as a secret agent for the German government.

As to the proof of this act, he notes (p. 688),

> His return on June 6, 1917, was proved by two passengers, who were in the second cabin along with him, and his presence in New York, registered under surreptitious names, was proved by a number of witnesses. Nothing was shown of what he had done in Rotterdam or anywhere else in Europe except that he had been met upon the street by one of the witnesses in clothes noticeably better than that which he possessed while on board.

Victorica—and possibly O'Leary—testified to delivery of the messages at a meeting subsequent to defendant's return

noted, his theory as to what the law once was and should still be, does not assign to the overt act element the role merely of corroborating evidence of intention, but rather emphasizes its character as "act" by insisting that an accomplished levying of war or giving of aid and comfort should be shown.

> The words "overt act" go back to the original statute of the 25th Ed. III. Under chapter 3 of 21 Rich. II no overt act was necessary for two years, until it was again reintroduced by chapter 10 of the 1st of Hen. IV, the preamble to which indicates the reason for its restoration: "There was no man which did know how he ought to behave himself to do speak or say for doubt of such pains" (of treason). It is clear that men feared prosecutions pieced together inferentially from chance words or deeds which need not be charged and against which no preparation could be made. Even in the times of Hen. VIII, when the law of treason was extended to its extremest limit, the provision was retained of some overt act, or at least some written or spoken words which evinced the traitor-

(p. 688). Since there were two witnesses to defendant's return on the steamer, but these witnesses could not testify that defendant bore messages, it seems clear that it is Judge Hand's concept that the act must be such as evidences intent, which leads him to rule that there were not "two direct witnesses to the whole overt act", but only to part of it. The opinion in *Cramer* v. *U. S.*, 137 F. (2d) 888, 895 (C. C. A. 2d, 1943) thus appears to be in error in declaring that Judge Hand's theory of the nature of the overt act is expressed only as a "dictum". See also notes 29 and 49, *supra*, regarding Judge Hand's analysis of the "proper" character of the overt act, as the accomplished offense.

ous design. That design was indeed the substance of the act of compassing, and, in spite of the long history of distortion which compassing endured, the logic of the relation between the overt act and the crime was kept sound. In short, the treason must be manifested by some open deed, whose happening necessarily involved the commission of the crime. This was probably what the original words meant.

In cases of adhering to the enemy the same consistency was not observed. Strictly no overt act should have been held sufficient which merely manifested a traitorous intent, because the treason lay in hostile acts, for the words "adhering" must be taken as defined by the phrase, "giving aid and comfort". It was hardly the purpose of the 25th of Ed. III to allow the treason of levying war or of adhering to the enemy to be proved merely as attempt; nor is there a sound reason for supposing that the overt act was meant only to disclose a traitorous intent in treasons which involved more than intent. Probably the analogy with compassing confused the subject, but, whatever the cause, it was decided before the end of the seventeenth century (Lord Preston's Case, 12 How. St. Tr. 646) that aid and comfort need not reach the enemy, and that, though the accused were frustrated in his attempt, it was enough if the overt act declared his intent. This has since remained the law * * *

Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent. It is true that in prosecutions for conspiracy un-

> der our federal statute, it is well settled that any step in performance of the conspiracy is enough, though it is innocent except for its relation to the agreement. I doubt very much whether that rule has any application to the case of treason, where the requirement affected the character of the pleading and proof, rather than accorded a season of repentance before the crime should be complete. Lord Reading in his charge in Casement's Case uses language which accords with my understanding: 'Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.'[38]

As will be noted, Judge Hand cites only the terms of the statutes for his claim that the overt act should show accomplished aid and comfort or levying of war.[39] That the *prima facie* meaning of the statutory words supports him is evidenced by the early legislation and judicial constructions which were felt necessary in turbulent times to strike preventitively at conspiracies not covered by the Statute of Edward III.[40] But both in the breadth of its terms and the basic nature of the crime with which it deals, and the policy which it represents, the Statute has the character of a constitutional provision the scope of whose meaning unfolds with experience. And the history of the Statute shows that long before *Lord Preston's Case*, the overt act element in treason had been

[38] 259 Fed. 685, 689–690 (S. D. N. Y. 1919).

[39] 2 Stephen, H. C. L. 263; 4 Holdsworth 496–497; 8 *Id.* 910.

so treated as to make the crime itself of the nature of an attempt.[60] As Judge Hand concedes,

[60] Staundford has nothing pertinent to the attempt aspect of "treason", except like all his successors he in effect notes that compassing is itself a crime in the nature of an attempt ("Cest compassement, ou imagination, sauns reducer ceo al effect, est grand treason * * *" Lib. 1, cap. 2 H). This is not to say that early law would view treason as merely an attempt at some further result, however Coke begins his treason chapter by noting early authority demonstrating the maxim "voluntas reputabatur pro facto": i. e., early authority regarded the criminal intent in all serious crimes, at least when something was done towards its effectuation, as dangerous enough to be regarded as the substantive crime itself. Coke, 3d Inst., 5. Coke perhaps supports Judge Hand's theory, that in early history attempted treason was not treason, in his doctrine that a conspiracy to levy war is not the crime of levying war. Coke, 9. However, Pollock and Maitland and Holdsworth explain this not as arising from any aversion to treating treason as an attempt, but as arising from the tenacity of the feudal concept of mutuality in the bond of lord and vassal, entitling the aggrieved vassal to war on a lord who had broken the bond. 2 Pollock and Maitland 508; 8 Holdsworth 331. Quaere, however, whether the crime does not, practically, take on the character of attempt when Coke approvingly states that it is not necessary that there be a great number of persons to levy war (p. 9). Coke's stress on the statute's declaration that the defendant be "provablement * * * attaint" (p. 12) might be deemed to support Judge Hand's stress that the object of the overt act requirement is to bar patchwork constructions of evidence; Coke explains this means, "upon direct and manifest proof, not upon conjecturall presumptions, or inferences, or straines of wit, but upon good and sufficient proofe * * *" He is not here directly interpreting the meaning of the overt act element; but, in the next section, in which he does undertake to do so, he says it "doth also strengthen the former exposition of the word [provablement] that it must be probably, by an open act,

the English decisions following Lord Preston's Case make this perfectly clear; and there is noth-

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which must be manifestly proved." (p. 12). Judge Hand's distinction of adhering and levying from compassing on the ground that in the first two "the treason lay in hostile acts" may be supported by inuendo in Coke's statement (p. 14), that the act requirement "relateth to the severall and distinct treasons before expressed, (and especially to the compassing and imagination of the death of the King, &c, for that it is secret in the heart) * * *".

1 Hale, 131, 150, in effect introduces into the exposition of the crime of levying war a definition which makes it much of the nature of an attempt, when he says that the mere assembly of men in force, and their marching in military arrays, make out a levying; or the mere assembly in present force alone. *Id.*, 138 (case of the Earl of Essex). And he states that it is not necessary that a blow be struck. *id.*, 144, 152. His discussion of adherence is very brief, and the examples given are of completed aid and comfort, as by delivery of a castle to the enemy. *Id.*, 167–168.

1 Hawkins, 86, 94, in effect makes Judge Hand's point, that the design is itself the complete crime in compassing, citing the case of the regicides. But Hawkins also recognizes that the mere keeping together of armed men against the king's command is a levying of war. *id.*, 90; and that there may be a levying, though there is no actual fighting. *Id.*, 91. He is brief to the point of not being helpful in his definition of adherence; but he cites with approval the ruling that merely cruising with intent to destroy the king's subjects is adherence when done with the king's enemies. *Id.*, 91.

Foster, 195, introduces the first real analysis of underlying policy, when he justifies the doctrine that in compassing the design is itself the completed offense, by pointing to the importance to the security of the community of the king's safety, which supports the wisdom of striking at an early stage at threats to this security. Foster contributes little additional in defining the degree of accomplished resistance to lawful authority that is necessary to

ing in the discussions surrounding the framing and ratification of the Constitution to suggest

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constitute levying of war. Regarding adherence, he approves the decisions finding a completed offense though the aid and comfort was intercepted, "for the party in sending did all he could; the treason was complete *on his part, though it had not the effect he intended.*" *Id.*, 217. He simply cites cases, and makes no reference to his discussion of the policy behind the broad scope of compassing, though he does take pains to note that the defendants in the cited cases were also charged with compassing. He states that the rulings considered as defining the crime of adherence, "may very well be supported", but in context this appears to mean only that they are supported by precedents. Lumping both levying and adhering together, he recognizes, without analyzing the underlying policy, that they may be made out without showing that the threat to the state has actually been brought to fruition: "An assembly armed and arrayed in a warlike manner for any treasonable purpose is *bellum levatum*, though not *bellum percussum*. Listing and marching are sufficient overt acts without coming to a battle or action. So cruising on the King's subjects under a *French* commission; France being then at war with us, was holden to be adhering to the King's enemies, though no other act of hostility was laid or proved." *Id.*, 218.

The upshot of this is scant. Judge Hand really has nothing more than the words of the Statute of Edward III on which to base his argument. Coke and Hale seem to have relied likewise on the contrast between the terms in which the three main branches of treason are there described, to explain why the conspiracy to levy war was not sufficient to make out a levying of war. But the scope of levying war seems, from Coke on, to make that offense analogous to an attempt, in the solicitude shown for taking preventive action against a threat to state security. Analysis of the crime of adherence is almost wholly lacking, and when it appears, amounts to no more than a citation of decisions which look in the same direction as developments under the head of levying war.

that in this respect the familiar terms of the English definition were intended to be taken in their unglossed rigor. The American decisions are in accord.[81]

Whether Judge Hand means to suggest that, in addition to amounting to the accomplished levying of war or giving of aid, the overt act must be evidence of the treasonable intent, is not altogether clear.[82] Plainly, the first does not neces-

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[81] See *Ex parte Bollman*, 4 Cranch 75, 126, 2 L. Ed. 554, 571 (U. S. 1807); *U. S.* v. *Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814); *U. S.* v. *Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628, 631 (Circ. Ct. D. Pa. 1814); charge to Grand Jury, by Story, Circ. J., Fed. Cas. No. 18,275, 30 Fed. Cas. 1046, 1047 (Circ. Ct. D. R. I. 1842); *U. S.* v. *Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 24 (Circ. Ct. N. D. Cal. 1863); *U. S.* v. *Fricke*, 259 Fed. 673, 678, 679 (S. D. N. Y. 1919); *U. S.* v. *Stephan*, 50 Fed. Supp. 445, 448 (E. D. Mich. 1943). That the law of treason is probably, in fact, the origin of the general law of attempt, see Hall, Criminal Attempt (1940) 49 Yale L. J. 789, 794–797, 815; *cf.* 2 Stephen, H. C. L. 227; 2 Pollock and Maitland 503, 509; 8 Holdsworth 309, 320. That treason is of the nature of a "direct attempt", see Strahorn, Effect of Impossibility of Criminal Attempts (1930) 78 U. Pa. L. Rev. 962, 964. This is also the executive construction of the scope of "treason" in the President's proclamation of April 16, 1917, warning of the nature and penalties of treasonable activities. 18 U. S. C. A. Annotation to Tit. 18, Ch. 1, Sec. 1, p. 1. *Contra*: *Respublica* v. *Malin*, 1 Dall. 33 (Pa. 1778). See Strahorn, *op. cit. supra*, p. 994–995.

[82] In the first of the paragraphs quoted at note 78, *supra*, he seems to emphasize primarily that the overt act should amount to the accomplished giving of aid and comfort or levying of war, rather than that it must evidence intent. This is consistent with his correct emphasis there that in compassing the expression of the design was not only evidence of intent but was itself the "act" constitu-

ing the crime. In the second quoted paragraph, his preoccupation is still with his regret that something less than the accomplished act has come to be accepted; but here he does imply that the act should be evidence of intent as well as fulfilling the more important function of constituting the accomplished levying or giving of aid and comfort: it would not be "sound" to suppose that the act was meant "only" to disclose intent in crimes involving more than intent. It is only in the last quoted paragraph, after he has regretfully to concede that the precedents determine an attempt to be sufficient, that he apparently clings to the requirement that the act evidence intent; and by the time his analysis reaches this stage, his insistence seems more like an effort to repair damage done to a more fundamental doctrine, than conviction that he is expounding the truly basic, historically established principle which he believes in.

One aspect of the opinion in *Stephan* v. *U. S.*, 133 F. (2d) 87 (C. C. A. 6th, 1943) might, at first reading, seem to support the proposition that the act must evidence the intent; but, as in the *Robinson* case, more careful examination of the opinion raises a doubt whether this was the court's meaning, and shows that the real issue is one of the lack of sufficient evidence of intention apart from the act charged. Overt act No. 9 is described by the court as charging

> That Stephan [defendant] on April 18, 1942, escorted Krug [the escaped prisoner] to the place of business of Theodore Donay in Detroit, introducing Donay to Krug, who then related to Donay the incidents of his escape, his version of prison conditions in the prison camp in Ontario and of the intended future travel of Krug, at which place Stephan purchased candy for Krug and obtained money from Donay which was given to Krug for his use.

Id., 93. Krug was one witness to this act.

> The confirmatory witness * * * is one Rintelen, clerk in the business house of Donay. He knew appellant [defendant] and identified Krug from his

photographs. He testified that the two came in and appellant asked to see Donay, whereupon the three, standing close together "engaged in an important conversation which they held secretly." He saw appellant purchase the candy and saw Donay go to his cash drawer and when he next looked Donay was walking back to the others. The next day Rintelen found a slip for $20.68 in the cash drawer, indicating that Donay had withdrawn that amount.

Ibid. The court declares that,

> * * * the proof of overt act (9) falls short. Rintelen overheard no consecutive part of the conversation that took place between Krug and Donay and we find nothing in his testimony from which a jury could be certain of what was said between them. The circumstances indicate with certainty that the Donay incident occurred but it cannot be established by vague testimony of one witness, plus circumstantial evidence. See United States v. Robinson, supra, 259 F. page 694.

Id., 94. Note that apparently the only testimony regarding intent, in connection with this overt act, No. 9, is that of Krug and Rintelen. The latter's testimony at the most might be deemed to convey circumstantial evidence (and that weak) of an intent on Donay's part to aid Krug with money; but it is of course no evidence to show that Donay knew who Krug was, and no evidence that defendant brought Krug there with the intent to obtain money for him from Donay, or to obtain it by telling Donay of Krug's actual purposes. Krug testified that he told his whole story to Donay, so that from this, one has evidence of Donay's intent in giving him money and in concealing Krug's identity; but Krug testified on cross examination that it was Donay and not defendant who gave him the money, and he did not testify to anything except the fact of his accompanying defendant to Donay's place of business, from which one might infer that defendant brought him there with the intent of obtaining further aid for him, unless from the circumstance that there is no evidence that

defendant objected when Krug disclosed his identity to Donay. Of course, from the other facts of defendant's aid to Krug, one might infer that when he took Krug to a person whom, according to Krug's testimony, defendant introduced as a "friend", it was with the intent of obtaining further aid. The intent, by the fact of the meeting, to give aid to Krug would distinguish this meeting from purely incidental meetings at which defendant introduced Krug, under an assumed name, just because the latter was with him when they met someone defendant knew; but the court treats one of this latter type of meeting as a sufficient overt act, by the concealment of Krug's identity (overt act No. 7). This was not that type of overt act, for there are not two witnesses to prove concealment of identity, and indeed one of the witnesses (Krug) testifies that identity was disclosed. In sum, as an overt act of procuring financial aid from Donay for Krug, No. 9 fails for satisfactory evidence of intention; and, on the other hand, it is plainly not relied on as an overt act by the concealment of Krug's identity.

It must be admitted, however, that the opinion indicates that the court did not clearly analyze the basis for its objection to the proof of overt act No. 9. The overt act is stated not merely as the introducing of Krug to Donay, but as the obtaining of money for Krug from Donay. As has been pointed out, conviction on this basis might well be disallowed because the evidence of intent is too weak. But the court phrases its objection in terms indicating that it feels it is the evidence of the overt act, rather than that of defendant's intent in connection therewith, which is insufficient: "We think that the proof of overt act (9) falls short." *Id.*, 94. But, since the crux of this act is not concealment, nor even the extending of "sympathy" or comfort by advice or persuasion, exhortation, etc., but is the procuring of money, it sounds as if the court is concerned for the absence of proof of intent, when it goes on to specify that

> Rintelen overheard no consecutive part of the conversation that took place between Krug and Donay

sarily imply the second.[52] If he does mean that the act must evidence the intent, his history is again dubious. His interpretation of the significance of the repeal of 21 Rich. III, ch. 3, by 1 Hen. IV, ch. 10, is not an unreasonable one, on the face of the statutes alone. However, Lord Hale, who is the only one of the commentators to discuss the meaning of this repealer in any detail, criticizes it in ambiguous terms which may as reasonably be construed to object to the lack of evidence of a dangerous will-to-action, as to absence of evidence of an evil mind.[53] Moreover, Hale attributes the declaration of the preamble of 1 Hen. IV, ch. 10, to the uncertainties created by other broad provisions regarding treason besides that of the act of 21 Richard III.[54] The words of Hen. IV, ch. 10, are themselves open to the construction that,

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and we find nothing in his testimony from which a jury could be certain of what was said between them.

Ibid. In its summary of Rintelen's testimony (*id.*, 93), the court takes pains to note that Rintelen does not testify to seeing the actual transfer of money from Donay to Krug; but it does not mention this gap in spelling out its reasons for finding the "proof of overt act (9)" insufficient.

[52] Compare Marshall's reservation, in Ex parte Bollman, of the possibility of convicting those who, when war has actually been levied by others, "perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy. . . ." 4 Cranch 75, 126, 2 L. Ed. 554, 571 (U. S. 1807). The decision subsequently, in U. S. v. Burr, Fed. Cas. No. 14,693, 25 Fed. Cas. 55 (Cir. Ct. D. Va. 1807), turns on a fatal variance between the proof and the overt act charged, and does not reject the dictum of the Bollman opinion.

[53] See 1 Hale 85, 111.

[54] *Id.*, 266, 267.

with the overt act element removed, men did not know *how far* they could go in the expression of ideas or in their conduct, before they would be deemed dangerous actors. In fact, this seems a more reasonable interpretation of the uncertainty allegedly created by the act of Richard III, for, otherwise, as Stephen drily observes of the preamble of 1 Hen. IV, ch. 10,

> This language is obviously exaggerated. A man could hardly help knowing whether or not he intended, and whether or not his conduct indicated, an intention to kill or depose the king, but strict accuracy of statement is not to be expected of political opponents.[66]

The passage which Judge Hand quotes from the charge in Casement's case supports the proposition that the act must evidence the intent little more than many other passages which could be quoted to the effect that the act must "manifest" the intention. As has been previously pointed out, such language is ambiguous, and may as well be intended to mean that an intention whose existence has been proved by other evidence must be shown to have been put into effect in some form of action.[67] It seems clearly to be so used, for example, by Judge Mayer in *United States* v.

[66] 2 H. C. L. 254.

[67] For similarly ambiguous language, see Ex parte Bollman, 4 Cranch 75, 134, 2 L. Ed. 554, 573 (U. S. 1807); *U. S.* v. *Burr*, Fed. Cas. No. 14, 692a, 25 Fed. Cas. 2, 14, and Fed. Cas. No. 14, 693 *id.*, 55, 167, 169; *U. S.* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 399-400 (Circ. Ct. D. Vt. 1808); Charge to Grand Jury, Fed. Cas. No. 18,272, 30 Fed. Cas. 1036, 1037 (Circ. Ct. S. D. Ohio, 1861).

Fricke, where after stating that the overt act is required lest a man be convicted of treason "merely for having the intention in his own mind", and that "an overt act may in itself be a perfectly innocent act standing by itself", he sums up with the assertion that "This intention must be manifested by what is termed an overt act."[28]

An argument might be drawn from the two-witness requirement, that the overt act so to be proved must amount to more than any step taken in execution of an intention established by evidence extrinsic to the act: the requirement is clearly intended as a protection to the defendant against perjury and a manufactured case; if the act must be such as in itself is at least some evidence of a treasonable intent, the difficulties of producing two witnesses to such an act will make the requirement a real barrier to faked prosecutions; if any act in execution of an intent otherwise proved is sufficient, the difficulties of proof are so far reduced as to negative the value of the intended safeguard. This argument is not necessarily involved in Judge Hand's ruling in *United*

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[28] See note 55, supra. Compare charge of the trial court in *U. S.* v. *Haupt*, 47 Fed. Supp. 836, 83. (N. D. Ill. 1942), in a passage not criticized upon the reversal of the conviction in 136 F. (2d) 661 (C. C. A. 7th, 1943):

> Any intentional act or acts furthering the hostile designs of the enemies of the United States gives aid and comfort and constitutes adhering to such enemies. * * * An overt act, in criminal law, is an outward act done in pursuance and in manifestation of an intent or design; an overt act in this case means some physical action done for the purpose of carrying out or affecting [sic] the treason.

States v. *Robinson*, "that it is necessary to produce two direct witnesses to the whole overt act", and his dictum that

> It may be possible to piece bits together of the overt act, but, if so, each bit must have the support of two oaths * * *

For, assuming the adoption of some definition of the "overt act", a contrary ruling would violate the clearcut decision in the Constitutional Convention to adopt a more strict evidentiary requirement than that under the English statute, as Judge Hand points out.[89] But, this still leaves the critical question of defining the character of the overt act, and Judge Hand brings to the support of his sound evidence ruling certain arguments outside of the record of the Constitutional Convention which suggest that in his mind, the two-witness requirement calls for the strict definition of the act previously urged in his opinion. First,

> The requirement of two witnesses probably had its rise from the canon law * * *; and in fact heresy and treason were necessarily regarded as closely analogous at a time when the axiom was everywhere accepted, cujus regio, ejus religio. * * * Such a

[89] 259 Fed. 685, 692–693. Thus this part of Judge Hand's opinion is approved in the opinion in *U. S. v. Haupt*, 136 F. (2) 661, 675 (C. C. A. 7th, 1943), without any indication by the Circuit Court of Appeals that it would adopt his concept of the overt act. Indeed, in the *Haupt* case, some of the acts charged in the indictment, whose substantive validity is not challenged by the reversal of the convictions, seem to involve conduct which would not necessarily "openly manifest any treason" within Judge Hand's requirement. See 136 F. (2d) at 835.

> procedural requirement, wherever it comes from, implies a system of trial not rational in its processes at all, one in which the cause was tried by the sacramental nature of the oath itself (Wigmore, s. 2032), one where the witnesses were guarantors or sponsors for the parties. * * * It would be a complete misunderstanding to suppose that, when applied to treason it only meant that the prosecution's witnesses to any overt act should number at least two. In the sense of the rule he is not a witness who testifies only to an isolated and neutral fact, which is relevant because it rationally corroborates the story of a direct witness. When evidence is estimated quantitatively it is the support of the oath that counts, and the witness is no neutral narrator of past truth. He is 'on the side' of him who calls him; he is of 'his tail,' as it were, of his array against the opposite array. It is, of course, quite true that in the ultimate test the jury will decide rationally; but I have now to consider only this formal requirement, which had its origin in other and wholly different ideas. * * * Treason requires two such witnesses to the overt act. It has on this account always been necessary to produce direct, and not enough to produce circumstantial proof. Rex v. Lowick, 13 How. St. Tr. 267, 305; Burr's Case, 25 Fed. Cas. 55, 476. And so, taken historically we seems to me no doubt as to the correctness of the defendant's position."[70]

Granting the correctness of this characterization

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[70] 259 Fed. 685, 691.

of quantitative rules of proof,[71] it is hard to see its relevance to the interpretation of either the English or the American evidentiary requirements in treason. These were not adopted by men dominated by primitive notions of proof, but by men of hard-headed, practically-founded political experience who were seeking a practical, political result.[72] There seems to be no evidence, and Judge

[71] Note that, as Judge Hand points out, the two-witness rule in canon law was the "ordinary" rule concerning the necessary quantum of evidence in all cases, and—contrary to the impression which may be conveyed at the first meeting of his opinion—was not peculiar to the law of heresy. *Ibid.* This would seem further to reduce the likelihood that adoption of the form of the rule into the law of treason was accompanied by adoption of its original philosophy, which had no special bearing on any offense analogous to treason. See 7 Wigmore on Evidence (3d ed. Boston, 1940) sec. 2032, at p. 242.

[72] The section which Judge Hand cites from Wigmore deals with the history of the general rules of quantitative proof in times when "primitive notions prevailed" (7 Wigmore, p. 243). Concerning the adoption of the English rule, Dean Wigmore relates,

> It is clear enough that the rule requiring two witnesses to prove a charge of treason was not a common-law rule, but had its beginning in the statutes of the 1500s * * * The first statutory provision was that of Edward VI (1547 and 1552) * * * The immediate circumstances leading to this step were probably the extreme methods used in some of the political trials with which the reign of Henry VIII had just closed. The law of treason had been by this monarch, as never before, wrested to his own personal and arbitrary ends; and (as Sir James Stephen has acutely remarked in another connection) the dominant legislator class, who might not have cared how many a humble subject was unjustly convicted of petty thievery, were well alive to the possibilities of treason law, if

Hand cites none, that when the draftsmen borrowed an old rule for their present, concrete purposes, they in any degree were moved by the ancient philosphy which had originally supported the rule. Judge Hand in effect concedes the unreality of his suggestion when he notes that "of course" the jury will decide rationally; the judge

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the rapid turn of the political wheel should chance to bring them underneath; and they probably were moved by the thought of self-protection against the future. As an expedient for this purpose, it was natural that they should seek aid in a rule of numbers. The numerical conception of testimony was then still an instinctive one among all; the ecclesiastical rules of that sort lay plainly in sight, in the spiritual practice; and a rule of numbers was perhaps not only the natural, but to them the only conceivable expedient for providing this protection.

7 Wigmore, *op. cit. supra* note 71, sec. 2036, pp. 263, 264. So, too, he finds the origin of the treason rule in no primitive notions:

> The object of the rule requiring two witnesses in treason is plain enough. It is, as Sir William Blackstone said, to "secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages."

Id., sec. 2037, p. 269. So far as the provision in the United States Constitution is concerned, the record of the Convention, though brief, makes clear that the evidentiary safeguard was provided out of a purely rational consideration of probative values; indeed, it would be difficult to find two members of the convention less likely to have been moved by considerations drawn from a "system of trial not rational in its processes" (259 Fed. at 691), than Benjamin Franklin and James Wilson, whose remarks alone are recorded on the point. See 7 Wigmore, sec. 2039, p. 272; 259 Fed. at 692-693.

will, of course, likewise decide rationally what is competent evidence to go to the jury. That it has "always been necessary to produce direct, and not enough to produce 'circumstantial proof'" of the act, similarly depends in the cases not on the continuance of an archaic philosophy of proof by oath bearers, but upon a rational relation of means to end: if a special rule of evidence has been provided by statute or constitution, obviously for the protection of the accused, it follows that the admission of evidence should be such as to effectuate this policy. This is plainly the viewpoint from which Mr. Chief Justice Marshall makes the ruling in the Burr trial, which Judge Hand cites in his support:

> Collateral points may, say the books, be proved according to the course of the common law; but is this a collateral point? Is the fact, without which the accused does not participate in the guilt of the assemblage if it was guilty, a collateral point? This cannot be. The presence of the party, whose presence is necessary, being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the constitution and the law. If procurement takes the place of presence and become part of the overt act, then no presumptive evidence, no facts from which the procurement may be conjectured or inferred, can satisfy the constitution and the law.[73]

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[73] *U. S. v. Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55, 176 (Circ. Ct. D. Va. 1807). Likewise a purely rational

Nor should such a passage as that here quoted from the Burr trial be taken to mean that the overt act must itself be some peculiarly significant act in the execution of the treason; all Marshall is saying is that, whatever is the overt act charged in the indictment, it must be proved by the direct testimony of two witnesses, and not by circumstantial evidence. Thus, if a meeting of conspirators in furtherance of their design is the act charged, the accused's presence is not to be proved by inference from his previous statements that he would be there, or that he did not answer the telephone at home during the time when the meeting was in progress elsewhere; but rejection of such circumstantial evidence in no degree implies that his presence at the meeting, if directly proved

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weighing of probative values is the obvious consideration in the passage which Judge Hand cites from *Rex* v. *Lowick*, 13 How. St. Tr. 267, 305 (1696), where in his charge to the jury Lord Chief Justice Holt states,

> Indeed I might have mentioned the evidence of Fisher to you, but that is but circumstantial, and does not come home to the case; but being given it may be mentioned; and that is, about the 8th of February, Fisher had some discourse with Lowick, and it seems there was notice taken of the intended invasion, and Lowick said he would serve his master faithfully; and that the witness thought was meant of the late king; and he said at another time, that he would not discourse with above one at a time, because of the late act of parliament that was then a passing, relating to high treason, that required two witnesses. Now, I say, this is not any proof against the prisoner, but it is a circumstance that may shew his inclination to the late king.

by two witnesses, might not amount to a sufficient overt act."[74]

From the relaxation of the English rule to permit the required two witnesses to testify to distinct overt acts of treason, Judge Hand draws another argument of more realistic character, to suggest that the overt act must be one not innocent on its face. Noting that a similar development occurred in the canon law regarding proof of heresy, he argues

> This development of the rule of contestes [i. e., two witnesses to the same individual act of heresy or treason], both in heresy and treason, shows that the pressure of necessity substituted as an avowed, though an unorthodox, equivalent, separate oaths to two separate instances ('overt acts') of the same general character. Yet each of these oaths must directly support one of the several instances ('overt acts'). Moreover, it was always the rule in treason that the jury must believe both witnesses * * *. It scarcely needs much historical imagination to see that, if such an expedient were chosen as a relief from the stringency of the law as it stood, it could only have been because the existing rule demanded the sup-

[74] See Baldwin, Circ. J., in *U. S. v. Doebler*, Fed. Cas. No. 14,977, 25 Fed. Cas. 883, 886 (Circ. Ct. E. D. Pa. 1862):

> The constitution and law of the United States require that the overt act should be established by two witnesses, not by the establishment of other facts, from which the jury might reason to this fact; after this fact is established, other facts may be admitted in the character of corroborative or confirmatory testimony.

> port by two witnesses of all the facts making up the specific charge (the 'overt act'). If it meant no more than that one direct witness must be corroborated in the sense that later and more rational procedure understands that word, no need for the equivalent devised as such relief could ever have existed. It is, of course, much harder to obtain one direct witness to each of two several instances than a corroborating witness to some innocent detail of the story of a single witness. Indeed, no prosecution has much chance of success without some corroboration, and the rule, if so interpreted, means in practice nothing whatever.[75]

It is reasonable to regard the English rule, as it eventually developed, as a weaker safeguard to the accused than the rule of the United States Constitution; but this is, after all, a matter of fact, and so far as the opinion shows, Judge Hand's reasoning on the point is *a priori*. The present form of the English rule has been regarded in its home country as representing a very material protection.[76] And Dean Wigmore sees the special virtue of the American rule not in any resultant implication that the overt act must evidence the intent, but in a consideration which

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[75] 259 Fed. 685, 691–692 (S. D. N. Y. 1919).

[76] See Best, Evidence, quoted in 7 Wigmore on Evidence, *op. cit. supra*, note 71, sec. 2037, p. 269; *cf.* 4 Stephen, Commentaries on the Law of England (18th ed. London, 1925) 156, 394; Kenny, Outlines of Criminal Law (15th ed. Cambridge, 1936) 457. As is noted in the text Dean Wigmore regards the present English rule as a relaxation from a desirable strictness, but for a reason which does not support Judge Hand's conclusion. 7 Wigmore, p. 270.

might apply to any conduct sufficient to constitute an attempt according to familiar criminal law standards: namely, that

> the opportunity of detecting the falsity of the testimony, by sequestering the two witnesses * * * and exposing their variance in details, is wholly destroyed by permitting them to speak to different acts."

Moreover, Judge Hand's inference from the history of the evidentiary requirement in English law seems inconsistent with two well established rules in the application of the two-witness rule, the validity of which he neither denies nor mentions. Thus, the defendant cannot require the prosecution to establish the treasonable intention by two witnesses. Mr. Justice Iredell answered this contention squarely in charging the jury in the first trial of Fries:

> It is the opinion of the counsel for the prisoner that you must be convinced, not only of the fact by two witnesses; not only that he was concerned in a certain act; but that you must have the evidence of two witnesses, at least, by evidence drawn from the same place, that it was done with a treasonable intention, before you can pay any attention to any other evidence whatever. The fact is that, when the overt act is proved by two witnesses, it is proper to go into evidence to show the course of the prisoner's conduct at other places, and the purpose for which he went to that place where the treason is laid, and if he went

"7 Wigmore on Evidence, *op. cit. supra*, note 71, sec. 2037, p. 270.

> with a treasonable design, then the act of treason is conclusive.[78]

And in the same case, Judge Peters likewise charged,

> Two witnesses are necessary to prove the overt act. But the intent may be proved by one witness, collected from circumstances, or even by a single fact.[79]

Conversely, as the quoted portion of Mr. Justice Iredell's charge also shows, conduct which would suffice as an overt act need not be proved by two witnesses when offered as evidence of intention.[80] Although it is conceivable that the overt act might be required to be such as evidences treason, in order to provide corroboration of the direct evidence of that element, it seems oddly inverted to require stricter proof of the corroborative than of the direct evidence of the facts from which intent is to be inferred.

Finally, the attempt made by Judge Hand in the *Robinson* case and by the defense in *United States* v. *Cramer*, to require an overt act which "in itself" evidences treasonable intention is of dubious value in perfecting the analysis of the crime, be-

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[78] Fed. Cas. No. 5126, 9 Fed. Cas. 826, 914 (Circ. Ct. D. Pa. 1799). Despite the innuendo which might be drawn from his phrasing, it is apparent in the context that Iredell did not mean to imply a requirement of order of proof such as Marshall subsequently rejected in the Burr trial. See note 36, *supra*.

[79] *Id.*, 909.

[80] 7 Wigmore, *op. cit. supra*, note 71, sec. 2037, p. 270. See discussion in U. S. v. Doebler, Fed. Cas. No. 14,977, 25 Fed. Cas. 883, 885–886 (Circ. Ct. E. D. Pa. 1832), per Baldwin, Circ. J.

cause it rests on an unsound concept of what an act "means". The law treats a physical movement as an act only if it is willed. Thus behind every jural act there is, *ex hypothesi*, some purpose, for it seems psychologically impossible to will a movement without some purpose. Some acts—as, for example, the concentration of attention upon listening to music—may conceivably have a purpose (as distinguished, perhaps, from the more remote question of motive) which in all normal cases may be inferred from observation of the acts alone. This is not a theoretical matter, but is true simply because some acts are capable of serving a narrower range of human satisfactions or designs than others. But when one is dealing with ends as broad as the subverting of a government by domestic disturbance or by aid to its enemies, the range of acts which may fit such purposes is as broad as the possible economic, political, social, racial, sectional, or class factors which affect the health or existence of a community, and in which it may be vulnerable. The acts which may serve to advance purposes of such range will, conversely, be acts which might in another context serve innocent purposes in economic, political, social, racial, sectional, or class dealings. Indeed, so varied is the character of the conduct which may serve the broad purposes penalized by the treason clause, that even the man whose purpose at the concert seems to be the obvious and undivided one of concentrating on the music may be concentrating to hear the one deliberately false note by the first violin, which will convey the message that "the fleet sails tonight." The point

was illustrated in *United States* v. *Schulze*, a prosecution under the Espionage Act, when the defendant objected to the admission of evidence of statements which he made on other occasions than that which formed the basis of the indictment. The prosecution justified on the ground that the disputed evidence was tendered to prove the defendant's intention in speaking the words which were the basis of the present indictment. Defendant replied with an effort to demonstrate that the statute did not require a showing of intent, because it merely penalized anyone who

> shall by word or act support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States therein.

The trial court properly answered that intent must be an element, because without it words or acts would have no meaning, so that in no case could it be told whether, even in an objective sense, they supported or favored the enemy:

> Intent is a necessary element of this offense, notwithstanding the absence of the words "willfully" and "intent". Words spoken in one set of circumstances may mean an entirely different thing from words spoken in another set of circumstances. If the American army are advancing and the Huns are retreating, and I say, "We cannot always hope to win"; that is pessimistic. If the Huns are advancing, and the Americans are retreating, and I say, "We cannot always hope to win", that is optimistic. In order for the government to prove the crime, the govern-

ment must give color to the words. One cannot look at these words uttered by the defendant, and say that they necessarily favor the cause of Germany. Some of the sentences would not convey that meaning at all, without intent being shown.[81]

[81] 253 Fed. 377, 379 (S. D. Cal. 1918), aff'd without reference to this basis of decision, 259 Fed. 189 (C. C. A. 9th, 1919).

The tight-knit analysis presented in Hall, Criminal Attempt (1940) 49 Yale L. J. 789, 824–825, considers, and rejects, as a test of the proximity of act to accomplished crime the criterion stated by Salmond, that "An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it is done." Hall comments,

> Isolated behavior is always ambiguous so far as legal significance is concerned. A person carries a gun in his possession. Is his purpose to defend himself, to hunt or to kill a man? An individual is caught just after he has unlatched a window in a dwelling house. Is his intention to steal or to keep a rendezvous? Ambiguity is sometimes much reduced, as, for example, when a passenger in a subway train places his hand in another's pocket. Even here the act alone does not necessarily mean a criminal intent, or, at least, any particular criminal intent. The passenger may have been a creditor trying to recover his own property or its equivalent; or, if the pocket were a lady's, the purpose may have been lewd rather than larcenous. We cannot say until we know the relevant facts and circumstances. The unequivocality test is, accordingly, invalid because it arbitrarily confines judgment as to intention to a narrowly circumscribed "act". This is not done, and it would be unwise to judge on such rigorously restricted evidence. As a consequence, it would, as seen, impose liability for non-criminal acts, and, on the other hand, it would too long defer liability. Hence the assertion that

In theory, no act has a meaning in itself, in the sense of a significance which can be grasped by observation of the act alone; in practice, one understands the meaning of acts he observes in most cases because he knows other facts in context with the observed acts, and this is particularly likely to be so in dealing with the kind of purposes penalized by the treason clause, since they may be served by manifold acts which can also serve many other purposes. That an act is not "innocent in itself" or evil in itself, but derives its meaning from the context of conduct and circumstances in which it occurs, is shown both by the fact that acts may be found treasonable which on their face are "innocent",[82] and that

"an act which is in itself and on the face of it innocent, is not a criminal attempt" is untenable. It has long been held that an act might be quite innocent in itself, but found to express a criminal intention on knowledge of surrounding circumstances.

This comment is the more pertinent, since Hall recognizes that "treason" is in its nature an attempt, and indeed, probably the source of the general law of attempts. *Id.*, 794–797.

[82] See *U. S.* v. *Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814) (purchase of provisions, intended for enemy); *U. S.* v. *Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18 (Circ. Ct. N. D. Cal. 1863) (fitting out a sailing vessel, when intended to act as a privateer); *Hanauer* v. *Doane*, 12 Wall. 342, 20 L. Ed. 439 (U. S. 1871) (sale of goods, when intended for enemy use); *U. S.* v. *Fricke*, 259 Fed. 673 (S. D. N. Y. 1919) (holding of funds on deposit, or borrowing money, when for convenience of enemy agent); *U. S.* v. *Werner*, 247 Fed. 708 (E. D. Pa. 1918) (words); *U. S.* v. *Haupt*, 136 F. (2d) 661 (C. C. A. 7th, 1943) (holding funds, securing lodgings, furnishing mailing address, when for convenience of enemy agent).

acts which on their face appear treasonable may be found innocent.[83] If acts could have meaning in themselves, it is hard to see why in the centuries of experience represented by the criminal law it has been found necessary or desirable to

[83] See *U. S.* v. *Hodges*, Fed. Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815) (delivery of prisoners to enemy); *U. S.* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397 (Circ. Ct. D. Vt. 1808) (armed clash with troops seeking to enforce national embargo); *U. S.* v. *Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105 (Circ. Ct. E. D. Pa. 1851) (forcible resistance to execution of Fugitive Slave Law); *U. S.* v. *Magtibay*, 2 Philipp. 703 (1903) (duress); *U. S.* v. *Leiner*, Cr. No. 113-120, S. D. N. Y., 1943 (unreported) (mis-statements to authorities regarding identity of spy). Distinguish cases where the prosecution fails because the acts shown are not deemed sufficiently advanced in execution of the intent: *U. S.* v. *Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628 (Circ. Ct. D. Pa. 1814); *U. S.* v. *De Los Reyes*, 3 Philipp. 349 (1904).

There is no more striking example of conduct on its face clearly treasonable, but in fact found innocent, than the case of Joshua Hett Smith. Smith, a resident of the West Point area, arranged to have two of his tenants row him on the night of September 21, 1780 to the British sloop Vulture, lying in the Hudson. He hailed the vessel as a friend, boarded her, and was aboard for 15–20 minutes, after which he returned to the rowboat accompanied by Major Andre, whom he then brought ashore for the meeting with Arnold. Smith took Andre to his house and furnished him with the civilian coat which Andre wore at the time of his capture. Smith was tried before a court martial convened under a resolution of the Congress authorizing the commander in chief thus to try any citizen who should harbor or secrete any of the subjects or soldiers of Great Britain, knowing them to be such, or should be instrumental in conveying intelligence to the enemy. His defense, apart from a challenge to the jurisdiction of the court martial, was that Arnold had

develop the concept of intent as a separate element of crimes, as in treason.[38]

Of course, even though it be held proper in theory that the "overt act" be simply some step in execution of the intent, and not such as necessarily evidences the intent, one might emerge with the practical result of requiring the latter, if he insisted that the act be very far along in execution. For the closer the act is to accomplishment, the more likely that it will in fact be some evidence of intent. But the cases have not pressed the matter to this point, and those involving charges of adherence to the enemy have been markedly liberal in applying what seems the familiar technique of the law of attempts. Such ordinary commercial transactions as purchasing goods, holding money on deposit, provisioning a ship, and borrowing from a bank have been held

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enlisted his aid on the pretext that this was a means of obtaining information helpful to the American cause. The most careful student of the Arnold conspiracy apparently believes that Smith was telling the truth. Van Doren, Secret History of the American Revolution (N. Y. 1941) 330, 331, 337. The court martial acquitted the defendant, finding that although he had aided Arnold,

> yet they are of opinion, that the evidence is not sufficient to convict the said Joshua H. Smith of his being privy to, or having a knowledge of the said Benedict Arnold's criminal, traitorous and base designs.

See The Trial of Joshua H. Smith for assisting the enemy, Tappan, New York, September, 1780, 6 American State Trials (Lawson, ed. St. Louis 1916) 486; 2 Chandler, American Criminal Trials 255 (Boston, 1844); Smith, An Authentic Narrative of the Causes which lead to the death of Major Andre (N. Y. 1809) 118.

[38] See notes 28-39, *supra*.

sufficient overt acts, where they were linked with an intention thereby to give aid and comfort to an enemy.[86] There seems no logical reason why a meeting might not be a sufficient overt act, whether its purpose be simply to plan future activity, or whether it serves as a means to effectuate plans already or then and there formulated. The authority is firm, however, that a meeting to plan to subvert the government is not an overt act of treason; this is "conspiracy to levy war", and ever since Lord Coke pronounced it no treason, his dictum, given without satisfactory explanation save as such may be inherent in the phrase "levying war", has been religiously followed.[87] There is no comparable line of historical authority against a meeting to plan the giving of aid and comfort to an enemy, as a sufficient overt act. And it seems taken for granted that harboring an enemy agent is a sufficient overt act of adherence, though the line between this and a meeting to plan the giving of aid might become quite shadowy.[87] If the meeting is not to plan, but to effectuate a plan; or even if the meeting is to plan, but in addition is brought together in a state of readiness forthwith to execute such plan as may be made, this is a sufficient overt act even under

[86] See note 82, *supra*.

[87] See Marshall, C. J., in Ex parte Bollman, 4 Cranch 75, 126, 2 L. Ed. 554, 571 (U. S. 1807).

[87] This is one of the overt acts charged in U. S. v. Haupt, in an indictment the substantive validity of which was not involved in the reversal of the convictions. 47 Fed. Supp. 836, 839 (N. D. Ill. 1942), 136 F. (2d) 661 (C. C. A. 7th, 1943).

the charge of levying war." In *United States v. Greathouse*, the assembling of the ship's company aboard a vessel intended as a privateer, but not yet so equipped, seems to be treated as a sufficient overt act of itself.[2] The intent of course will always determine the criminality of meeting, and thus if the sole evidence on this score is of a meeting with a known rebel or enemy, with no evidence of intent that the meeting serve any purpose of the rebel or enemy, the most that could be made out would be misprision of treason. Moreover, the nature of "war" is that it is a collective activity, and this serves to explain in part at least Marshall's well known remarks on the necessity of an assemblage: individual action may amount to levying war when men are already

[1] See U. S. v. Mitchell, Fed. Cas. No. 15,788, 26 Fed. Cas. 1277, 1278 (Circ. Ct. D. Pa. 1795); Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 914 (Circ. Ct. D. Pa. 1799) (first trial) s. g., Fed. Cas. No. 5127, id., 924, 931 (Circ. Ct. D. Pa. 1800) (second trial); Ex parte Bollman, 4 Cranch 75, 134, 2 L. Ed. 554, 573 (U. S. 1807); U. S. v. Burr, Fed. Cas. No. 14,692a; 25 Fed. Cas. 2, 14 (Circ. Ct. D. Va. 1807) and s. c. Fed. Cas. No. 14,693, id., 55, 165, 168; Charge to Grand Jury, Fed. Cas. No. 18,263, 30 Fed. Cas. 1015 (D. Mass. 1851); U. S. v. Haupt, 47 Fed. Supp. 836, 839 (N. D. Ill. 1942), rev'd on grounds not affecting the substance of indictment, 136 F. (2d) 661 (C. C. A. 7th, 1943); cf. U. S. v. Stephan, 133 F. (2d) 87, 93, 94 (C. C. A. 6th, 1943). But *cf.* Story, Cir. J., in charge to Grand Jury, Fed. Cas. No. 18,275, 30 Fed. Cas. 1046, 1047 (Circ. Ct. D. R. I. 1842); Grier, Circ. J., in charge to jury in U. S. v. Hanway, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 126 (Circ. Ct. E. D. Pa. 1851).

[2] Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 24 (Circ. Ct. N. D. Cal. 1863).

waging a war, but in no fair sense of the term can the isolated acts of an individual be said to constitute war against a state." But he is also unwilling to overrule ancient authority rejecting conspiracy to levy war as a sufficient overt act, and hence he insists that the assemblage be in present force. Despite some ambiguous references to this force as evidencing the intention behind the assemblage, in their total context, his remarks reflect a basic policy of insisting, as would the law of attempts, that defendants be shown to have had some minimum capacity-in-fact to do harm such as makes them dangerous.[90]

[90] See U. S. v. Burr, Fed. Cas. No. 14,693, 25 Fed. Cas. 55, 165, 168 (Circ. Ct. D. Va. 1807).

[91] For the underlying emphasis on the fact of capacity to do harm, rather than on the armed assembly as evidence of intent, see U. S. v. Burr, loc. cit. supra note 90, p. 169:

> the court [in the Bollman opinion] unquestionably did not consider arms as an indispensable requisite to levying war. An assemblage adapted to the object might be in a condition to effect or to attempt it without them. Nor did the court consider the actual application of the force to the object as at all times an indispensable requisite; for an assemblage might be in a condition to apply force, might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have been inferred, it is thought, too hastily, that the nature of the assemblage was unimportant; and that war might be considered as actually levied by any meeting of men, if a criminal intention can be imputed to them by testimony of any kind whatever.

Such passages cast a different light on the emphasis in the following familiar remarks (*ibid.*), which, viewed

Some additional light in attempting to define the function of the overt act element, and the consequent nature of the evidence sufficient to establish the overt act, may be obtained by considering the function of the intent element in the crime of treason. Obvious as is the function of the latter, it seems quite forgotten in the ingenious theory woven by Judge Hand in the *Robinson* case and the defense in the *Cramer* case to explain why the act must evidence the intent. The more or less explicit justification of that theory is that it is necessary to protect the innocent from wrongful convictions; in treason, unlike conspiracy, Judge Hand declares, the act requirement "affected the character of the pleading and proof, rather than accorded a season of repentance before the crime should be complete."[92]

Previous analysis has suggested that the cases uniformly treat the act and intent elements of the

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in isolation, might seem to imply that the reason for insisting on an assembly in force is to show intention only:

> Before leaving the opinion of the supreme court entirely, on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion which the means bear to the end? Why is it that a single armed individual entering a boat and sailing down the Ohio for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount to levying war?

[92] 259 Fed. 685, 690 (S. D. N. Y. 1919).

crime as distinct, creating a strong inference that they are intended to serve different ends; that the cases likewise are almost unanimous in suggesting that the function of the overt act element is, as in other crimes, to demonstrate that defendant had moved from the realm of thought into that of execution; and that, although it would not be irrational to define the overt act element so that it will serve to corroborate the intent, there are sound reasons against this, so that the burden of proof is upon him who asserts it. This analysis seems reinforced when the cases further reveal a marked tendency to define the intent element with considerable care, with the effect of setting at least as definite bounds to the offense as result from all the talk about the overt act, if not more so.

"Treason" means a betrayal of allegiance, owed either because of citizenship or because of lawful presence under protection of the laws. The idea of betrayal connotes a specific intent, and this is the line of development of the American as well as of the modern English cases. Most of the excesses of the English law of treason, prior to the 18th century, can be described in terms of a treasonable intent found by inference under the head of compassing the death of the king: men were convicted not on evidence fairly showing that they had planned the king's death and the overthrow of the government, but on the basis of expression or advocacy of ideas or measures whose "natural" consequences, as deduced by their political foes, might involve harm to the king or the state.[33] The overwhelming evidence is that

[33] See 8 Holdsworth 327 ff.

the treason clause of the United States Constitution was intended to limit the scope of that offense; and, as we have seen, that is the admonition of policy on which the courts of this country have centered ever since. As the treason clause is the product not of theory, but of history, the practical meaning of its restrictive policy should be drawn from history. The most obvious manner in which the Constitution narrows the scope of treason is by omitting any analogue of the crime of compassing the king's death. Since most of the reprobated doctrines of the English law had developed under that head, it makes historical sense to look there for the kinds of doctrine which the framers wished to bar from the American law of "treason". There is of course some truth in the observation that the crime of compassing had no ready analogy in a republic; but to treat this as more than a minor factor would be to substitute bloodless logic for living policy.

In this light, it is the raising of a treasonable intent from inferences drawn at second or third hand, or worse, together with the closely related matter of punishing men as traitors merely for the expression or peaceful advocacy of unpopular ideas, which were the historic targets of the framers' restrictive policy. The second matter has been taken care of by a strict insistence, dating back to Coke, that the mere speaking of words is not an "overt act", however clear the intention; and by now this seems to have crystallized into a firm doctrine that neither written nor spoken expression of ideas or advocacy of opinions

is, without more, a sufficient overt act within the meaning of the treason clause.[94] The first evil has, on the other hand, been dealt with by a clear tendency in the cases to require a showing of specific intent. Texts sometimes assert that a specific intent is not necessary, to make out "treason".[95] As has been pointed out, such a proposition disregards the fact that the holding of a man to the "natural" treasonable consequences of his conduct is the very technique by which the reprobated "constructive treasons" were raised. There is loose language in some opinions, it is true, to the effect that one accused of treason may not disavow the natural consequences of his act, by pleading that he sought merely a commercial profit by selling supplies to an enemy or rebel, or that he helped an enemy or rebel agent merely out of friendship or compassion.[96] The critical fact in

[94] See cases cited in note 50, *supra*.

[95] See, *e. g.*, Miller, Criminal Law (St. Paul, 1934) 502. Apart from its inconsistency with the history of the American law of treason, this proposition seems contrary to the familiar doctrine that a specific intent is necessary in crimes of the nature of an attempt. See Keedy, Ignorance and Mistake in the Criminal Law (1908) 22 Harv. L. Rev. 75, 89; Sayre, Criminal Attempts (1928) 41 *id.* 821, 822, 844; Skilton, Mental Element in Criminal Attempt (1937) 3 Univ. of Pitts. L. Rev. 181, 182; Turner, Attempts to Commit Crimes (1934) 5 Camb. L. J. 230, 235; cf. Harno, Intent in Criminal Conspiracy (1941) 89 U. Pa. L. Rev. 624, 636, 637.

[96] See *e. g.*, *U. S.* v. *Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 398 (Circ. Ct. D. Vt. 1808); trial court charge in *U. S.* v. *Stephan*, 50 Fed. Supp. 738, 744 (E. D. Mich. 1943). John Brown's defense to the charge of treason by levying war against the state of Virginia was, in part,

such situations, however, would seem to be the defendant's knowledge that he is dealing with the foe. If he has such knowledge, then in fact when he sells supplies or gives money or concealment, he intends to do the prohibited act—to aid the enemy. The plea of profit or friendship goes not to his intention, but to his motive; and it is merely applying elementary doctrine to hold that if defendant had the specific intention to bring about a result which the law seeks to prevent, his motive is irrelevant.[97] Of course the mercy of

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that he had no intent further than "to free slaves". See The Trial of John Brown, 6 American State trials (Lawson, ed. St. Louis, 1916) 798, 801, 802. There was evidence, however, that Brown had envisioned his effort to help the slaves as possibly involving the creation of a separate commonwealth, and although he seems to have raided Harper's Ferry with no well thought-out plan for the steps to follow, his intent seems plainly to have embraced such overturning of existing institutions as might be necessary "to free slaves". See Warren, John Brown (N. Y. 1929) 350, 384; Villard, John Brown (Rev. ed. N. Y. 1943) 427.

[97] Thus the profit motive does not excuse selling provisions to the enemy. *U. S.* v. *Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814); *Hanauer* v. *Doane*, 12 Wall. 342, 20 L. Ed. 439 (U. S. 1871); *Carlisle* v. *U. S.*, 16 Wall. 147, 21 L. Ed. 426 (U. S. 1873); *Sprott* v. *U. S.*, 20 Wall. 459, 22 L. Ed. 371 (U. S. 1874). And the mingling of friendship or sympathy for the known enemy with the intent to aid him, knowing him an enemy, does not negative the treasonable intent. *U. S.* v. *Stephan*, 50 Fed. Supp. 744, note (E. D. Mich. 1943), 133 F. (2d) 87, 99 (C. C. A. 6th, 1943); *U. S.* v. *Cramer*, 137 F. (2d) 888, 893 (C. C. A. 2d, 1943). Nor does hostile duress acting on other persons than defendant, or directed at property, justify giving aids. *U. S.* v. *Hodges*, Fed.

juries is always an incalculable factor here, and one deliberately preserved in our system.[98]

Apart from the difficult question of mixed motive, the tendency of the cases to insist on specific intent in treason means a rejection of intention which amounts merely to holding a man for the "natural" consequences of an intention not proximately aimed at the subverting of the government or the giving of aid and comfort to enemies. The strongest assertion of this tendency has been in the cases involving charges of levying of war by forcible opposition to the execution of a single statute or other act of authority. The English decisions prior to the middle of the 18th century went far in finding that riotous assemblies for any

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Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815); *U. S.* v. *Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628 (Circ. Ct. D. Pa. 1814). Cf. *U. S.* v. *Hughes*, Fed. Cas. No. 15,418, 26 Fed. Cas. 420 (S. D. Ohio, 1864), and Thompson, A Treason Trial in Ohio (1883) 4 Ohio Bar Assn. App. 133.

A contrary doctrine concerning sale of supplies to the enemy might seem to have evolved in the Confederate States of America. Though originally regarded as clearly involving treason, trade with the enemy there "came to be more generally regarded as an offense against the revenue laws than as an act of treason." Robinson, Justice in Grey (Cambridge, 1941) 177. The circumstances strongly suggest, however, that this course of opinion reflected a practical compromise with facts; such trade as was going on seemed probably of greater benefit to the South than to the North.

[98] Thus despite the confused argument of Pinckney for the defense, and the unsatisfactory charge of Duval, Circ. J., the issue of motive seems the real defense attempted in *U. S.* v. *Hodges*, cited note 97, *supra*, and the jury's verdict of acquittal may amount to interposition of mercy.

non-private purpose amounted to constructive levying of war; and this was so *a fortiori* if the object of the mob could be said to be to prevent by force the execution or procure the repeal of some official act.[99] That the latter is likewise treason under the Constitution was established in the cases arising out of the Whiskey Rebellion in 1794 and the Pennsylvania resistance to the federal property excise in 1799.[100] But even Federalist-minded judges laid down the law with significant and reiterated emphasis on the need for finding that the force was exerted for a general and public purpose and not merely to stop the collection of particular levies, or collection from particular persons only, or by a particular exciseman only.[101] In 1808, in *United States* v. *Hoxie*, Livingston, Circuit Justice, in effect directed a verdict on the basis that the conveying of a raft of logs to Canada, in violation of the Embargo, and with armed opposition to the troops seeking to enforce it, was not shown to be more than a particular violation

[99] See 8 Holdsworth 335 ff.

[100] See Paterson, Circ. J., in U. S. v. Vigol, Fed. Cas. No. 16,621, 28 Fed. Cas. 376 and in U. S. v. Mitchell, Fed. Cas. No. 15,788, 26 Fed. Cas. 1277; Iredell, Circ. J., and Peters, D. J., in Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 840, 909, 912, and Chase Circ. J., in the second trial of Fries, Fed. Cas. No. 5127, *id.*, 924, 930. Needless to say, the Jeffersonian Congress' impeachment of Mr. Justice Chase was not based on any objection to such parts of his charge to the jury in the Fries trial as confined the definition of treasonable intention; and, significantly, Chase's answer to his impeachment boldly makes capital out of the fact that his refusal to allow defense counsel to describe early English treason law to the jury was based on its excessive scope, both in intent and in act. See 8 Fed. Cas. 938 ff.

of law for profit, and hence was not treason for lack of the requisite intent. Emphasizing the agreement of men learned in the law upon "the exceptions, which have been so cautiously interwoven into" the doctrines regarding levying of war, "for the very purpose of preventing their extension to cases of this kind", he notes that it may sometimes be hard to distinguish between treason and some other offenses involving opposition to authority.

> But, difficult as this may be, every one will at once perceive a very wide separation, between regular and numerous assemblages of men, scattered over a large portion of country, under known officers, and in every respect armed and marshalled in military and hostile array, for the avowed purpose, not only of disturbing and arresting the course of public law, in a whole district, by forcibly compelling the officers of government to resign, but by intimidation and violence, of coercing its repeal, and a sudden, transient, weak, unmilitary, and unsystematized resistance, and that in a solitary instance, and for the single object of personal emolument.[101]

[101] Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 400, 402 (Circ. Ct. D. Vt. 1808). Livingston's ruling is the more striking because, though the particular enterprise was only a somewhat unusually open and brash smuggling attempt, it probably represented a type of conduct which then met with the approval of a substantial part of the community, which was violently opposed to the Embargo. A different temper of mind towards the scope of "treason" might have led the court to find that a case existed. Cf. Moulton, A Vermont Treason Trial (1935) 29 Vt. Bar Assn. 121, 128–132.

Livingston's concentration is here entirely on the intent element as the safeguard against extension of the crime by inference:

> In what can we discover the treasonable mind, which common sense, as well as all the authorities tell us, is of the very essence of this offence?
>
> * * * * * *
>
> These learned judges also consider the intention as the only true guide in ascertaining whether certain acts amount to treason, or a less offence, and regard the universality, or generality of the design, as forming an essential ingredient in the composition of this crime.[102]

Mr. Justice Livingston had thus employed a careful insistence on the specific intent, to ensure that mere resistance to lawful authority and ordinary crime would not be treated as a levying of war. In *United States* v. *Hanway,* Mr. Justice Grier, on circuit, developed another facet of a carefully defined specific intent, by emphasizing that treason was inherently a crime of deliberate, pre-conceived intention; mere presence in a riotous assembly or sudden, impulsive joining in damage wrought, would not raise an adequate inference of participation in a design to levy war. Under what amounted to a direction by the court, the jury acquitted defendant of the charge of levying war by participation in a forcible effort to prevent the taking of escaped slaves under the Fugitive Slave Law. As has been already noted, Mr. Justice Grier raised a doubt whether, under the policy indicated by leading English decisions

[102] *Id.*, 399, 401–402.

in the generation preceding adoption of the Constitution, a rising against the execution of a particular law was enough to show treasonable intent, or whether the design must not be wholly to subvert the government.[103] But, at any rate, a calculated and general intention, directed to a public and not merely a particular or private object, must be shown; and despite lengthy condemnation of the riot which had occurred, causing the death of one man, the Circuit Justice was of the opinion that it was not treason:

> Not because the numbers or force was insufficient. But (1) for want of any proof of previous conspiracy to make a general and public resistance to any law of the United States; (2) because there is no evidence that any person concerned in the transaction knew there were such acts of congress, as those with which they are charged with conspiring to resist by force and arms, or had any other intention than to protect one another from what they termed "kidnappers" (by which slang term they probably included not only actual kidnappers, but all masters and owners seeking to recapture their slaves, and the officers and agents assisting therein).
>
> The testimony of the prosecution shows that notice had been given that certain fugitives were pursued; the riot, insurrection, tumult, or whatever you may call it, was but a sudden "conclamatio" or running together, to prevent the capture of certain of their friends or companions, or to rescue them if arrested. Previous to this transaction, so far as we are informed, no at-

[103] See note 26, *supra*.

tempt had been made to arrest fugitives in the neighbourhood under the new act of congress by a public officer.[104]

Since Grier notes that defendant was "confessedly present" at the disturbance, and that being present and aiding makes one a principal in treason (as, indeed, in other felonies), it seems clear that he does not question the sufficiency of presence as an overt act, but is concentrating on the intent.

> In the present case, Hanway was confessedly present. But did he come to aid,

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[104] Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 128 (Circ. Ct. E. D. Pa. 1851). Insistence on specific intent underlies Grier's admission of defense evidence that in the previous nine months there had been rough seizure of Negroes in the neighbourhood by men of dubious character, acting without show of official authority. This was recognized as a critical point, and was hard fought, on both sides. See Hensel, The Christiana Riot and the Treason Trials of 1851 (Lancaster, 1911) 78. The prosecution objected that the evidence was irrelevant. Grier answered (p. 112),

> The objection of the prosecution would be irresistible if Hanway was indicted simply for resisting an officer of government. But in treason there must be some previous agreement.

So also Grier and Kane, D. J., agreed that the prosecution, not having previously supplied the defense with a list of the witnesses on the point as the statute required, could not now introduce "rebuttal" evidence that for the year previous armed bands of Negroes had ranged the neighbourhood seeking out whites trying to reclaim slaves. Judge Kane declared (p. 114), that:

> The two elements of the crime are the act and the preconcert. * * * The evidence which is now offered is merely to prove that preconcert. It was an indispensable element of the original case.

> abet, countenance or encourage the rioters? * * * If * * * as is argued by his counsel, he came there without any knowledge of what was about to take place, and took no part by encouraging, countenancing, or aiding the perpetrators of the offence—if he merely stood neutral through fear of bodily harm, or because he was conscientiously scrupulous about assisting to arrest a fugitive from labour, and therefore merely refused to interfere, while he did not aid or encourage the offenders,

Grier says he may be guilty of a breach of morals or a misdemeanor for not aiding the officials, but not of treason, though

> * * * such conduct is a fair subject for the consideration of a jury, in connection with other circumstances, to show preconcert and guilty complicity with the rioters, murderers or traitors.[108]

In addition, further casting the protection of a cautiously defined intent element about the defendant, Grier charges the jury as Livingston did in the *Hoxie* case, that mere breach of the law, as by smugglers resisting the revenue officers, though necessarily involving forcible opposition to authority, is not treason. His evident distaste for the doctrine of constructive levying of war leads him practically to read it out of the scope of treason as that offense had been defined in the early English cases:

> A whole neighbourhood of debtors may conspire together to resist the sheriff and his officers, in executing process on their prop-

[108] *Id.*, 126.

> erty—they may perpetrate their resistance by force of arms—may kill the officer and his assistants—and yet they will be liable only as felons, and not as traitors. Their insurrection is of a private, not of a public nature; their object is to hinder or remedy a private, not a public grievance.[106]

The new climate of policy reflected in the *Hoxie* and *Hanway* cases is the more striking, since both prosecutions were brought as test cases by administrations eager to obtain the support of

[106] *Id.*, 128. Grier's observations are the more striking in view of the clarity with which District Judge Kane—who sat with Grier in the Hanway trial—had charged the Grand Jury on the theory that an attempt by force generally to prevent the enforcement of a single law was treason by levying war. See Fed. Cas. No. 18, 276, 30 Fed. Cas. 1047, 1048 (Circ. Ct. E. D. Pa. 1851). Judge Kane, a former district attorney and Attorney General of Pennsylvania, was herein merely reflecting his "well known views" on the need for strict enforcement of the constitutional right of slave owners to the return of their property. See Hensel, *op. cit. supra*, note 104, pp. 57–58. Justice Grier's evident distaste for the doctrine of constructive levying of war is further pointed by the contrast of his remarks with the clear presentation of the broader doctrine by the district attorney in his address to the jury. See Robbins, Report of the Trial of Castner Hanway (Philadelphia, 1852) 45, 53. Contrast also with Mr. Justice Grier's sweeping exclusion of the mortgage debtor's case the resort to force to stop the general operation of the mortgage foreclosure system in farm states at the depth of the depression of the 1930's. See Skilton, Government and the Mortgage Debtor (1929 to 1939) (Philadelphia, 1944) 74. So far as appears, no effort was ever made to charge these disturbances as constructive levying of war, though they seem within the scope of the older English authority.

favorable decisions for hotly controverted public policies. In this light, it is significant that the grounds on which President Adams decided to pardon those convicted in the earlier "state trial" of Fries and his companions amount also to an insistence that a levying of war can be established only on a showing of a specific intent to overthrow the government.[107]

[107] Attorney General Rodney recommended that the charge of treason be laid in the Hoxie case, as a salutary check on the New England opposition to the Embargo, which had progressed to the point that Jefferson had proclaimed a state of insurrection and had called out the militia to enforce the law. See Cummings and McFarland, Federal Justice (N. Y. 1937) 68; Moulton, *op. cit. supra*, note 101. The Hanway case arose at a time when conservative Northern opinion was anxious to show to the South evidence of the good faith and practicability of the Fugitive Slave Law as a partial answer to the Abolitionist agitation and the underground railroad. The apparent opportunity to make an early "example" led the Federal authorities to press the treason charge over the efforts of the state to assert its jurisdiction to prosecute for murder or at least riot. See Smith, Parties and Slavery (N. Y. 1906) 23, 24; Warren, Supreme Court in United States History (Rev. ed. Boston, 1935) 229–230; Hensel, *op. cit. supra*, note 104, p. 62. *Cf.* pamphlet, by A Member of the Philadelphia Bar, History of the Trial of Castner Hanway (Philadelphia, 1852) 84–85. The earlier, and more successful, resort to the broad doctrine of levying of war, in the Whiskey Rebellion cases likewise reflected a deliberate decision by the administration to employ the dread charge of "treason" as a salutary check to undesirable political tendencies. There is no evidence that the Federalists stirred the insurrection, but they seized on it with obvious relish as a means of tarring their opponents with the stigma of treason. See Baldwin, Whiskey Rebels (Pittsburgh, 1939) 266, 269–270. It is only fair, however,

Reported decisions indicate but one attempt to use the charge of treason by levying war, since

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to note that at its peak, the disaffection was close to a state of levying of war even in the strict sense of the term. *Id.*, Ch. VII.

President Adams' pardon of Fries and his fellows, after their conviction of treason for the forcible rescue from the Federal marshal of prisoners arrested under the hated property excise in 1799, seems to involve in substance an executive construction of the crime of levying war analogous to Mr. Justice Grier's insistence on pre-concert and specific intention to overthrow constituted authority. The questions which Adams posed to his heads of department, in seeking their advice on his disposition of Fries' petition for pardon indicate clearly the bent of the President's mind:

> * * * 4. Is it clear beyond all reasonable doubt that the crime of which they stand convicted, amounts to a levying of war against the United States, or, in other words, to treason? * * * 6. *Quo animo* was this insurrection? Was it a design of general resistance to all law, or any particular law? Or was it particular to the place and persons? 7. Was it anything more than a riot, high-handed, aggravated, daring, and dangerous indeed, for the purpose of a rescue? This is a high crime, but can it strictly amount to treason? 8. Is there not great danger in establishing such a construction of treason, as may be applied to every sudden, ignorant, inconsiderate heat, among a part of the people, wrought up by political disputes, and personal or party animosities? * * *

9 Works of John Adams (Boston, 1856) 58. Though he received unanimous advice, that the case was properly held treason and did not in that light establish any undesirable precedent, Adams gave a pardon by proclamation, May 21, 1800. *Id.*, 178. In a letter of March 31, 1815 to James Lloyd, justifying his conduct, Adams stated that his "judgment was clear, that their crime did not amount

the Civil War.. This has not been for lack of occasions on which, at least under the 17th and

to treason", and then repeated the substance of point "7" in his memorandum to the heads of departments. He also indicates, however, that his judgment was based largely on his appraisal of the defendants as ignorant of the nature of what they did. 10 *id.* 153, 154. His attitude towards the charge of "treason" against Fries is the more striking because of his strong condemnation of the disturbances, as reflected in his memorandum to the heads of departments, and in his letter to Jefferson, June 30, 1813. *Id.*, 47. 2 Adams, Life of John Adams (Philadelphia, 1871) 314–318, 1 Works, *op. cit. supra*, pp. 571–574, discusses the pardon, and comments (Life, 317, n.) that "The view of treason opened in this case there is no room here to consider. It must infallibly come up for revision at some time or other in the courts of the United States." *Cf.* Walters, Alexander James Dallas (Philadelphia, 1943) 79 ff.; (Note), 9 Fed. Cas. 944–947. Washington's pardons to those convicted in the Whiskey Rebellion cases apparently imply no similar doubt as to the policy of the legal doctrine under which the convictions were obtained, but represent the ordinary exercise of executive clemency. The leaders had escaped or had signed submissions to the government; the convicted Weigel was probably insane and Mitchell is put down by the historian of the Rebellion as a simpleton. See Baldwin, *op. cit. supra*, p. 264.

Grier's charge in the Hanway case, as quoted in the text, suggests in part that the intent requisite to make out treason is not shown if it appears that defendants regarded a resort to force as necessary in defense against what they in good faith believed to be an unlawful threat of violence under color of authority. This seems also to be the view suggested by Governor Ford, of Illinois, in his comment upon the dubious character of the charge of treason under which the Mormon leader, Joseph Smith, was arrested in that state in 1844:

> The overt act of treason charged against them consisted in the alleged levying of war against the State

18th century English authorities, sufficient overt acts might have been shown: witness the railroad strike riots of 1877, the Haymarket affair of 1886, Coxey's Army, and the Pullman strike in 1894.[108]

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by declaring martial law in Nauvoo, and in ordering out the legions to resist the *posse comitatus*. Their actual guiltiness of the charge would depend upon circumstances. If their opponents had been seeking to put the law in force in good faith, and nothing more, then an array of military force in open resistance to the *posse comitatus* and the militia of the State, most probably would have amounted to treason. But if their opponents merely intended to use the process of the law, the militia of the State, and the *posse comitatus*, as cats-paws to compass the possession of their persons for the purpose of murdering them afterwards, as the sequel demonstrated the fact to be, it might well be doubted whether they were guilty of treason.

Ford, History of Illinois (Chicago, 1854) 337. Here again, obviously, it would be the intent and not the act element of the offense which would be the defendants' bulwark.

[108] There seems to be no evidence that any stronger measures than the use of Federal troops were considered in connection with the 1877 riots. In view of the broad construction of "conspiracy" used to convict the leaders in the Haymarket meeting, it is notable that no charge of treason was attempted. See *Spies* v. *People*, 122 Ill. 1, 12 N. E. 865 (1887); The Trial of the Chicago Anarchists, 12 American State Trials (Lawson, ed. St. Louis 1920) 1; David, History of the Haymarket Affair (N. Y. 1936) Ch. XIV. The Spies decision was declared by (1887) 18 Weekly Law Bull. 326, 327 to be "the most portentous and dangerous . . . ever pronounced by a court of justice in the United States", because "the theories laid down in the Chicago case are essentially the exploded idea of constructive treason revived and applied to the crime of murder." Whatever the pacific protestations of its organisers, Coxey's "petition in boots" was the sort of mass movement on the

It seems a fair statement that, as a matter of practical construction, the crime of treason by levying war has been restricted here as perhaps in England, to the offense which the words *prima facie* describe—a direct effort to overthrow the government, or wholly to supplant its authority

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legislature which earlier English doctrine would almost certainly have regarded as within the scope of constructive levying of war; but, despite real official concern for the dangerous potentialities of the movement, the only prosecutions which eventuated were for the misdemeanors of unlawful parading on the Capitol grounds and trampling the grass. See McMurry, Coxey's Army (Boston, 1929) 104–106, 116, 123. The value of fastening a serious criminal charge on the leadership of the "Pullman" strike both as a matter of influencing public opinion and breaking the morale of the strikers was fully appreciated by the government, which, yet, relied on a conspiracy charge rather than the more intimidating accusation of treason; and there seems to be no evidence that the possibility of the latter was considered. See Lindsey, The Pullman Strike (Chicago, 1942) Ch. XII, and pp. 276, 278, 279, 280; *cf. Consolidated Coal & Coke Co.* v. *Beale*, 282 Fed. 934, 936 (S. D. Ohio, 1922). Any theory of constructive levying of war was conspicuously absent in strong charges delivered to Grand Juries in connection with the strike. See 62 Fed. 828 (N. D. Ill. 1894); *id.*, 834 (S. D. Cal. 1894); *id.*, 840 (N. D. Cal. 1894).

There are numerous dicta through the Civil War period, that the effort by force to prevent the general execution of a single law is a levying of war. See Charge to Grand Jury, by Story, Circ. J., Fed. Cas. No. 18,275, 30 Fed. Cas. 1046, 1047 (Circ. Ct. D. R. I. 1842); charge to Grand Jury by Sprague, D. J., Fed. Cas. No. 18,263, 30 Fed. Cas. 1015 (D. Mass. 1851); charge to Grand Jury by Nelson, Circ. J., Fed. Cas. No. 18,261, 30 Fed. Cas. 1007, 1012 (Circ. Ct. S. D. N. Y. 1851); charge to Grand Jury by Kane, D. J., Fed. Cas. No. 18,276, 30 Fed. Cas. 1047, 1048 (Circ. Ct.

in some part or all of its territory.[109] In terms of doctrine, this amounts to limiting the scope of the crime by insistence upon the showing of a carefully defined intention. That it is the intent and not the act element which expresses the limitation of the crime is reflected by the one episode in which a broader use was attempted of the charge of levying war. Following the Homestead Riot of 1892, several of the strike leaders were indicted for levying war against the state of Pennsylvania, after the Grand Jury had been charged by the Chief Justice of the state that

> A mere mob, collected upon the impulse of the moment, without any definite object beyond the gratification of its sudden passions, does not commit treason, although it destroys property and takes human life. But when a large number of men arm and organize themselves by divisions and companies, appoint officers and engage in a common purpose to defy the law, to resist its officers, and to deprive any portion of the fellow-citizens of the rights to which they are entitled under the Constitution and

E. D. Pa. 1851); charge to Grand Jury by Curtis, Circ. J., Fed. Cas. No. 18,269, 30 Fed. Cas. 1024, 1025 (Circ. Ct. D. Mass. 1851); *U. S.* v. *Greiner*, Fed. Cas. No. 15,262, 26 Fed. Cas. 36, 39 (E. D. Pa. 1861); charge to jury by Field, Circ. J., in *U. S.* v. *Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 22 (Circ. Ct. N. D. Cal. 1863); charge to Grand Jury, In re Riots of 1844, 4 Pa. Law. Jour. Rep. 29, 35 (Phila. Quar. Sess. 1844), also quoted at 26 Fed. Cas. 716; *Druecker* v. *Salomon*, 21 Wis. 621, 626 (1867).

[109] *Cf.* 8 Holdsworth, H. E. L. (2d ed. Cambridge, 1937) 320, 328–329; Kenny, Outlines of Criminal Law (15th ed. Cambridge, 1936) 315.

> laws, it is a levying of war against the state, and the offense is treason.[110]

These, as well as other charges, were quietly dropped subsequent to the acquittal of three of the men in prosecutions for murder growing out of the encounter with the Pinkerton men.[111] Significantly, the resort to the treason charge met with prompt and unanimous criticism from conservative professional sources. This ranged from the polite doubts of the Albany Law Journal to the biting commentary of the American Law Review, which found the indictment

> a mass of stale, medieval verbiage, drawn seemingly from some old precedent not dating later than the reign of William and Mary,

and which declared that the charge of Mr. Justice Grier, in the *Hunway* case,

> disposes of any attempt to raise to the grade of treason the act of a lot of half-starved mechanics, or their governing committee, where they are organized into a society, in taking unlawful measures to coerce their employer into compliance with their demands. The object is not to bring about any *political change* whatever, but to subject a party to an intended contract to a species of *duress*, such as will compel him to enter into a contract determined upon by the members of the unlawful combination. It is undoubtedly an unlawful

[110] Paxson, C. J., in *Commonwealth* v. *O'Donnell*, 12 Pa. Co. 97, 104–105 (O. & T. Allegheny Cty. 1892).

[111] See Burgoyne, Homestead (Pittsburgh, 1893) 294; Stowell, "Fort Frick" or the Siege of Homestead (Pittsburgh, 1893) 291.

> conspiracy, provided it has in contemplation the attainment of its object by unlawful means * * * But it is the wildest dream to dignify such a conspiracy with the name of treason.[112]

The character of the intention, rather than any difference in the overt acts, marks the line between riot and treason by levying war.[113] It is significant of the practical, restrictive force of the intent requirement, that hardly a score of the approximately 250 cases on riot or unlawful assembly listed in the American Digest System since 1787 involve prosecutions for disturbances arising out of issues of a public rather than a private character. It is likewise significant that most of these "public issue" riots could probably have been fitted within the crime of levying of war as it had been developed by construction before 1787.[114] The meaningful relation between the his-

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[112] (1892) 26 Am. L. Rev. 912, 914; *cf.* (1892) 46 Alb. L. Jour. 345; (1892) 31 Am. L. Reg. (n. s.) 691, 699; (1893) 15 Crim. L. Mag. 191, 197. Former Chief Justice Agnew, of Pennsylvania, is quoted (Burgoyne, 202 and Stowell, 258, *op. cit. supra*, note 111) as stating in a letter to the press that

> It is easy to distinguish treason from riot. It lies in the purpose or intent of the traitor to overthrow the government or subvert the law or destroy an institution of the state. Riot is a breach or violation of law, but without a purpose against the state.

[113] See Seagle, "Riot", 13 Enc. Soc. Sci. (N. Y. 1934) 388.

[114] In *Pennsylvania* v. *Cribbs*, Add. 277 (Pa., Westmoreland Cty. Ct., 1795) an attempt to tar and feather the Federal commissioners sent to adjust the controversy involved in the "Whiskey Rebellion" was treated as riot. *Cf. Pennsylvania* v. *Morrison*, Add. 274 (Allegheny Cty. Ct. 1795)

tory of the riot and treason cases is implicit in the recent ruling of the Supreme Court of Utah in *State* v. *Solomon*. Defendants had been convicted of participation in a riot over the admin-

(raising a Liberty Pole in disaffected area during visit of Federal commissioners; offense not specified). Even prior to the Fugitive Slave Law, efforts to rescue fugitive slaves by force from their masters were charged as riots, though in some instances at least the intent was probably broadly directed against the institution of slavery rather than representing a concern for the particular Negro involved. *State* v. *Connolly*, 3 Rich. L. 337 (So. C. 1832); *Clellans* v. *Commonwealth*, 8 Pa. St. (8 Barr) 223 (1848); *cf.* The Trial of the Rev. Jacob Gruber, 1 American State Trials (Lawson, ed. St. Louis 1914) 69 (Frederick Cty. Ct., Md. 1819) (inciting slaves to insurrection). It is notable that the Fugitive Slave Law itself created a specific offense to cover such attempts. 9 Stat. 462. Vigilantism has been treated as riot, though it represents an unlawful effort to supplant the constituted enforcement authorities. See *Crawford* v. *Ferguson*, 5 Okla. Cr. App. 377, 115 Pac. 278 (Okla. Ct. Crim. App. 1911). In *Commonwealth* v. *Jenkins*, Thacher Crim. Cas. 118, 12 American State Trials, *op. cit. supra*, (Boston Municipal Ct. 1825) 488, an effort to pull down all brothels was charged to be a riot. Forcible efforts to deprive certain racial, religious, or political groups in the community of the protection of the law have been prosecuted as riots. Charges to Grand Jury In re Riots of 1844, 2 Pa. Law Jour. Rep. (Clark) 135, 275 (Quarter Sess. and Oyer & Terminer, Philadelphia City and Cty. Ct. 1844); *Shouse* v. *Commonwealth*, 5 Pa. St. (5 Barr) 83 (1847). ("Know Nothing" clashes with the Irish); The Trials of Winthrop S. Gilman and John Solomon, and others, for Riot, 5 American State Trials, *op. cit. supra*, pp. 528, 589 (Alton Municip. Ct. 1838) (suppression of Abolitionist agitation—the Lovejoy riot); *Bradford* v. *State*, 40 Tex. Cr. 632, 51 S. W. 379 (Tex. Cr. App. 1899) (against employment of Mexican labor); *Bolin* v. *State*,

istration of "relief". The demonstration giving rise to the disturbance seems probably to have been Communist-organized. The district attorney in effect sought to give the prosecution the atmos-

193 Ind. 302, 139 N. E. 659 (1923) ("the Hunkies must go"); *cf. Commonwealth* v. *Daly*, 2 Pa. Law Jour. Rep. (Clark) 361 (Quarter Sess. City and Cty. of Philadelphia, 1844) and *Commonwealth* v. *Hare*, *id.* 467 (1844) (prosecutions for murder growing out of the Know Nothing riots); *People* v. *Judson*, 11 Daly 1 (N. Y. Com. Pleas 1849) (anti-English riot over the actor Macready; 23 persons killed in clash with militia). And the theory under which the "civil rights" statutes were sought to be applied to the Ku Klux Klan was that of ordinary conspiracy to violate the laws rather than that of constructive treason. See The Trials of Members of the Ku Klux Klan, 9 American State Trials, *op. cit. supra*, p. 593, ff. (Circ. Ct. D. So. C. 1871). Compare the cautiously restricted construction of statutory offenses of conspiracy to prevent by force the execution of the laws, as attempted to be applied against efforts to coerce certain classes of the population: in *Baldwin* v. *Franks*, 120 U. S. 678 (1887) [but *cf.* Deady, D. J., In re Impaneling and Instructing the Grand Jury, 26 Fed. 749, 754 (D. Ore. 1886)] (Chinese), and *Haywood* v. *U. S.*, 268 Fed. 795 (C. C. A. 7th, 1920) (coercion on government contractors). Extreme denunciation of organized government in public meetings has been treated as riot or unlawful assembly. *People* v. *Most*, 55 Hun 609, 8 N. Y. Supp. 625 (N. Y. Sup. Ct. 1890), aff'd, 128 N. Y. 108, 27 N. E. 970 (1891); *cf. People* v. *Most*, 171 N. Y. 423, 64 N. E. 175 (1902); *Commonwealth* v. *Frishman*, 235 Mass. 449, 126 N. E. 838 (1920). Demonstrations to influence the conduct of "relief" policy, eventuating in disturbances which probably were calculated, were prosecuted as riot or unlawful assembly in *People* v. *Dunn*, 1 Cal. App. (2d) 556, 36 P. (2d) 1096 (Cal. App. 1934); *Commonwealth* v. *Egan*, 113 Pa. Super. 375, 173 At. 764 (Super. Ct. Pa. 1934); *State* v. *Solomon*, 93 Utah 70, 71 P. (2d) 104

phere of a treason trial, when in his speech to the jury he emphasized that

> The riot charged here is not an ordinary riot; *it is a riot against your government* * * * because a riot took place

(1937), 96 Utah 500, 87 P. (2d) 807 (1939), note 115, *infra*; *State* v. *Moe*, 174 Wash. 303, 24 P. (2d) 638 (1933). Forcible efforts to prevent execution of process against debtors' property were treated as riot, though they took on the character of attempts to establish general policy rather than merely sympathetic efforts in behalf of particular distressed individuals. See Skilton, *op. cit. supra*, note 105; *Commonwealth* v. *Frankfeld*, 173 At. 834 (Pa. Super. Ct. 1934); State v. Woolman, 84 Utah 23, 33 P. (2d) 640 (1934); *State* v. *Frandsen*, 176 Wash. 558, 30 P. (2d) 371 (1934). Demonstrations to influence the conduct of foreign policy, eventuating in breaches of the peace probably foreseen and intended, were prosecuted as riot in Commonwealth v. Spartaco, 104 Pa. Super. 1, 158 At. 623 (Pa. Super. Ct. 1932) and *Commonwealth* v. *Kuhn*, 116 Pa. Super. 28, 176 At. 242 (Pa. Super. Ct. 1935). *Commonwealth* v. *Paul*, 21 At. (2d) 421 (Pa. Super. Ct. 1941) treated as riot what seems probably an attempt by force to prevent technological change. There are of course many cases in which breaches of the peace occurring in the course of labor disputes, usually arising out of picketing, have been prosecuted as riot. The abortive indictments for levying of war in the Homestead Strike (note 110, *supra*) seem to be the only attempt to use the law of treason to suppress labor conflict. That a "strong" prosecutor might have found a rationalization for this effort which Paxson, C. J. overlooked, is implied in the suggestion in (1892) 31 Am. L. Reg. (n. s.) 691, 700, that it would be treason if strike violence were shown to be intended to enforce a general public policy of collective bargaining. And Ex parte Jones, 71 W. Va. 567, 77 S. E. 1029 (1913), over a strong dissent by Robinson, J., employs a rationale derived in part from the broader authorities on "levying war" to

against the officers who were there to enforce the laws of the United States which we should honor and respect, and that is why I said, as I did, this isn't an ordinary riot case; and I want to say to you, my friends, this riot didn't commence on the 21st day of August. Technically this was the day when the scheme came into action, that is when they carried it into effect, and I say to you, gentlemen of the jury, that if we are to permit these *schemes*, maybe by people who have been misinformed; but, if we are to *permit these schemes to get into action, as happened in this case*, and if we let these acts go and condone them, I am telling you, my friends, that we will be in rather a serious situa-

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sustain the validity of detention of rioters for trial by military tribunals. The decision is not now regarded as sound authority. See Fairman, Law of Martial Rule (Chicago, 1943) 168–170. That careful definition of the scope of "riot" is necessary to protect a social interest in free speech and a desirable play of competitive claims, see *State* v. *Russell*, 45 N. H. 83, 85 (1863); *People* v. *Edelson*, 169 Misc. 388, 7 N. Y. Supp. (2d) 323 (Kings Cty. Ct. 1938).

For clarity, it is desirable to repeat that the recitation of the foregoing cases is not intended to suggest that in any of them should the prosecution have been for "treason"; quite the contrary. But most of them could have been colorably brought within the 17th and 18th century English precedents as to what constituted levying of war. And since most of them obviously boil up out of tense public situations, the entire absence of any suggestion or attempt to employ the treason charge indicates that the broader reaches of the crime of levying war have been so thoroughly buried under different conceptions of public policy as to make it a clear abuse of power to seek to revive them.

tion as far as our government is concerned.

I am making these preliminary remarks to you in the hope of getting you to sense, as I think you do, the importance of this case.

* * * I have no personal enmity toward any of them at all, but, gentlemen of the jury, *when they adopt and approve the philosophy they have done, and endeavored to carry them into operation* as they did endeavor to do in this case, that is when I part company with them, and that is when I say they should be penalized for their acts. * * *

The Supreme Court of Utah reversed the convictions on the ground that the district attorney had thus imported into the case something which the evidence in a prosecution for riot did not justify:

> That the challenged words were outside the evidence is clear. There was no evidence that this riot was against the government of the United States or the officers of the United States government. In fact the charge in the information and the evidence offered by the State showed merely that the defendants were, at most, concertedly disturbing the peace and quiet of certain persons in the relief headquarters by the use of or threats of use of violence toward such of them individually as blocked their path. Then again the argument that *"this riot did not commence on the 21st day of August"* and its designation as a *scheme* amounts to an argument that this riot had been planned and plotted some time before as a riot, uprising or rebellion against the government of the United States without

any pleading, claim or evidence to that effect. But the argument went on to say that if these things were not punished, "*we would be in a serious situation as far as our government is* concerned." (Italics added). The argument then savors of the idea that the case is important because defendants have adopted a certain philosophy. Couple such argument with the fact that after the naturalization examiner came in and sat beside the district attorney, the State had recalled one of defendants, Dave Sinclair (touched on later herein), and further cross-examined him on a wholly immaterial matter, his citizen or alien status, to show he was an alien, and the argument becomes poison. The argument is an appeal to prejudice and passion—an argument that defendants were aliens scheming to embarrass, and endanger, if not to overthrow the government. It was highly improper, prejudicial and presumptively detrimental to defendants' legal rights * * *. Appeals to political, racial or religious prejudice or passion are always improper and in cases such as this where no political question was even remotely connected with the charge, the misconduct of the district attorney and the palpable error of the trial court in its rulings thereon were departures so far from that which is proper or legal as to necessitate a reversal of the verdict and judgment.[115]

There are some indications of similar resort to a careful definition of specific intent, to check the dangerously vague potentialities of the charge

[115] 96 Utah 500, 503, 504–505, 87 P. (2d) 807, 808, 808–809 (1939); *cf.* s. c., 93 Utah 70, 71 P. (2d) 104 (1937).

of conspiracy to obstruct the execution of the laws.[116]

[116] Because of the vague scope of the crime, the definition of "conspiracy" presents problems analogous to those met with in the law of treason, concerning a fair balance between protection of public security and of the individual against oppressive prosecution. The most precise analysis of the problem stresses the critical importance of a careful definition of the intent element, as the most practical safeguard for individual liberty. See Harno, Intent in Criminal Conspiracy (1941) 89 U. Pa. L. Rev. 624, 646:

> Owing to the elasticity of the crime and its vague boundaries, there can be no doubt that it presents serious potential dangers of abuse. The view is here advanced that these dangers would tend to be reduced once the basic principles of the crime and particularly the role of the intent element in it are fully understood. The gist of the crime lies not, as has often been said, in the agreement. The agreement is a factor, but it is no more than that. The gist of the crime is in the intent. It may be true that the possibilities for mischief are heightened through a number of individuals, as distinguished from one individual acting separately, uniting in a common design, but the grave danger lurks nevertheless in the intent of the confederates.
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> The impression seems to be current, as Judge Learned Hand has pointed out, that once a criminal concert is established, all are liable for everything one of the participants has done, and that prosecutors, * * * can sweep into the drag-net of conspiracy all those who have associated in any degree in the enterprise. There is peril, indeed, to the individual and to the public in that attitude, and there is peril, also, in the inherent vagueness in the definition of the crime. But bad practices can be discouraged and the dangers associated with the crime can be allayed if the courts will with regularity enforce the injunctions of the law

Decisions concerning adherence to the enemy are as few as those regarding the levying of war, but this fact in itself makes more striking the care with which judges have sought to define the

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of conspiracy in accordance with its basic principles. Conspiracy is an inchoate crime for which the essential act is slight. It involves an intent to commit a further act. It is the commission of that act which the state desires to prevent, and it is with the intent to commit that act that the state is concerned. The essense of the crime thus lies in the intent.

The practical protection afforded against a finding of "guilt by association", by insistence upon a showing that any given defendant shared the specific intent to commit the plotted crime is shown in U. S. v. Bryant, 245 Fed. 682 (N. D. Texas 1917), aff'd. 257 Fed. 278 (C. C. A. 5th. 1919), 40 Sup. Ct. 117 (1920). Commenting on the jury's acquittal of several co-defendants whom the Circuit Court of Appeals regarded as 'apparently no less guilty' than those convicted, that court said,

The jury acquitted all but the three plaintiffs in error, and by so doing, found against the conspiracy, so far as its scope included the order as an organization, only implicating its officers. The fair inference to be drawn from the verdict is that the jury believed that the plaintiffs in error had formed an inner conspiracy, the purpose of which was to use the machinery of the order to resist any draft law that might be enacted, even to the extent of overthrowing the government, if necessary, and to accomplish this by overcoming the conservatism of the majority and committing them to their own views.

257 Fed. 384. So, also, a strict and precise construction of the intent element in the general federal conspiracy statute was the instrument employed to prevent a dangerously vague extension of the crime in Haywood v. U. S., 268 Fed. 795, 799–800 (C. C. A. 7th. 1920) cert. den., 256 U. S. 689, 65

requisite intention in order to protect the innocent. The most illuminating treatment of the point is in *United States* v. *Pryor*. There Washington, Circuit Justice, in effect directed a verdict,

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L. Ed. 1172, 41 Sup. Ct. 449. That case held that forcible interference by a labor organization with the operations of producers from whom the government expected to buy, or had contracted to buy, war supplies was not a conspiracy "by force to prevent, hinder, or delay the execution of any law of the United States" within the statute:

> How are the laws of the United States executed? By officials upon whom the duty is laid. Performance of that duty cannot be delegated. Producers who have contracts to furnish the government with supplies are not thereby made officials of the government. Defendants' force was exerted only against producers in various localities. Defendants thereby may have violated local laws. With that we have nothing to do. Federal crimes exist only by virtue of federal statutes; and the law makers owe the duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen or subject may lose his life or liberty. Section 6 should not be enlarged by construction. Its prima facie meaning condemns force only when a conspiracy exists to use it against some person who has authority to execute, and who is immediately engaged in executing a law of the United States.

The decision in Baldwin v. Franks, 120 U. S. 678, 30 L. Ed. 766, 7 Sup. Ct. 656 (1887), (conspiracy to drive out Chinese residents lawfully in the United States under treaty), proceeds on the same rationale of interpretation, though the application seems erroneous. See Field J., dissenting, id. 703-705; Deady D. J., in In re Impaneling and Instructing the Grand Jury, 26 Fed. 749, 754 (D. Ore. 1886).

partly because the evidence did not show specific treasonable intent. Defendant, who had been taken prisoner by the British squadron blockading the Delaware in 1814, sought to ransom himself and his fellows by going ashore with a British party under a flag of truce to help them purchase provisions. The court instructed the jury that the act of going ashore under a flag of truce was not a sufficient overt act, not because it failed to evidence intent, but because it was not an act sufficiently far advanced in execution of the intent. But, Mr. Justice Washington indicated that the existence of a specific intent to betray would affect the determination of what was a sufficiently advanced act to be an "overt act",—clearly, because some intents are more dangerous than others and hence the law should take earlier preventive steps against those holding them. Here there was a flag of truce and "no act of hostility was attempted, nor is there the slightest reason to believe that any was meditated by the prisoner, or by any of the party." In these circumstances,

> All rests in intention merely, which our law of treason in no instance professes to punish. Carrying provisions towards the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different from the act of going in search of provisions for such a purpose, and stopping short before any thing was effected, and whilst all rested in intention * * *
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> * * * * * *
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> But, if the intention of the prisoner was to procure provisions for the enemy, by

> uniting with him in acts of hostility against the United States or its citizens, which is chiefly pressed against him by the district attorney; then, indeed, it must be admitted, that his progressing towards the shore, was an overt act of adhering to the enemy, although no act of hostility was in fact committed. * * * [117]

In charges of adhering, as in those of levying war, though the mere fact of mixed motives will not negative guilt, the opinions have carefully instructed that the defendant must have in mind more than the purpose of aiding the particular individual with whom he deals: i. e., translated into the terms familiar in charges of levying war, he must be shown to have acted from a "public" purpose and not a particular or private one. Thus in *United States* v. *Fricke*, where the overt acts included the holding of funds and the borrowing of money for the use of a known enemy agent, Judge Mayer cautioned that

> If not satisfied beyond a reasonable doubt that the defendant's intention and purpose in acting as he did was evil—that is, if not satisfied beyond a reasonable doubt that he intended to aid and comfort the enemies of the United States—and if not satisfied that that was his object, the defendant must be found not guilty.

And he pointed up this injunction by the example, that it would not be treason to give or

[117] Fed. Cas. No. 16,096, 27 Fed. Cas. 628, 630, 631 (Circ. Ct. D. Pa. 1814). And compare the acquittal of Joshua Hett Smith, for lack of convincing proof of treasonable intent. Note 83, *supra*.

lend money to a former employee who had been discharged in wartime because of his enemy alien nationality, where there was no evidence that the purpose was anything but to help the man out of straitened circumstances.[118] In *United States* v. *Stephan*, in instructions subsequently approved by the Circuit Court of Appeals, the trial judge told the jury that

> The element of intent is of first importance in every criminal case. * * * Intent is the meat of the crime, and it is the meat of this crime.

and dealt carefully with the issue presented by defendant's contention that in aiding the escape of a German prisoner of war, he had acted only out of sympathy for the individual:

> Of course, if one were doing something such as buying food for his wife, and you were satisfied that they were lawfully married and he loved his wife, it would be hard to make you think that he was trying to help the enemy; but suppose the facts are different and you didn't find any reason why the assistance should be given except that he loved the other country better than he did his own, then the jury would take those facts and all of the facts into consideration in determining the real intent.

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[118] 259 Fed. 673, 676, 682 (S. D. N. Y. 1919).

[119] 50 Fed. Supp. at 744, note; charge approved, 133 F. (2d) 87, 99 (C. C. A. 6th, 1943). "Unless it is to be interpreted as applying the familiar rule that mere likelihood of mixed motive will not negative existence of the intent, a passage in the opinion in *U. S.* v. *Cramer*, 137 F. (2d) 888, 893 (C. C. A. 2d, 1943) might seem to go

Obviously, the language of some of these opinions confuses "motive" with "intent", but this very emphasis underlines the courts' anxiety that no one be found to have a treasonable intention merely on the basis of inference and innuendo. As has been suggested, the critical fact in all these situations was the accused's knowledge that he was dealing with an enemy.

The foregoing discussion suggests that the restrictive policy of the treason clause of the Constitution may be satisfied without requiring the showing of an overt act which in itself embodies both the intent and the act elements of the crime, or which at least is some evidence of intent. The constitutional policy is compounded of a limiting

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beyond the limits of a proper charge on intent as the policy thereon is reflected in other opinions:

> When one's country, though adopted, is at war, one cannot, without risk of conviction of giving aid and comfort to the enemy, freely associate even with old friends or assist them even in comparatively small ways, as by banking their funds or intermediating with others for them—once one knows or reasonably suspects them to be here in the role of illegal invaders, whether armed physically or with the more modern, but nonetheless destructive weapon of propaganda.

This might appear to cast on the defendant the burden of proving his innocence, rather than on the prosecution that of proving his guilt. But, the significant emphasis on defendant's knowledge or reasonable suspicion that he was dealing with an enemy agent indicates that the court is merely pointing out that, in view of that knowledge, defendant in fact had the specific intention of aiding the enemy; and that the further question of motive is immaterial.

definition of the scope of the offense and an evidentiary requirement. The scope limitation seems to have two objects: the first, to protect the innocent against the attribution of a treasonable intent by secondary or more remote inferences; the second, to protect the individual and the community interest in the free exchange of ideas and peaceful advocacy of policies concerning community affairs. Both as a matter of logic and of history, the first object seems properly protected by a careful definition calling for the showing of specific intent, the second by strict insistence that defendant be shown to have moved further into the stage of execution of ideas than is involved in their mere expression or even advocacy. The evidentiary requirement is in terms linked to proof of the act element, which seems, *prima facie*, to give as much basis for interpreting its scope in the light of the element it is designated to prove as for the reverse process. There is no substantial historical evidence to suggest that the two-witness requirement imports into the act element the function of demonstrating or corroborating intention.

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No. 13

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OCTOBER TERM, 1944

ANTHONY CRAMER, PETITIONER

v.

UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM ON BEHALF OF THE UNITED STATES

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MEMORANDUM ON BEHALF OF THE UNITED STATES

The petitioner's second reply brief was served on us on November 18, 1944. Inasmuch as we were unable to reply thereto at the oral reargument of the case, we respectfully request the Court to consider the following answers to certain of the statements made therein.

1. The petitioner ascribes to us (Rep. Br., p. 1) an "erroneous thesis" that he contends "that proof of the overt act in treason must comprehend and establish the entire crime." But in his first brief (p. 20) the petitioner stated that the test of the sufficiency of overt acts is whether they "as of themselves, and unaided by any other

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evidence, manifest treason". And he printed as an appendix to his first brief Judge Clancy's opinion dismissing an indictment for treason in *United States* v. *Leiner* (S. D. N. Y., unreported, 1943), and quoted with approval (I. Br., p. 32) Judge Clancy's statement that "under the law of treason a jury is not to engage itself in making inferences at all but only to decide on the credibility of the two witnesses who must prove the commission of each overt act or each part of an act consisting of parts. * * * Other testimony is admitted to confirm the intent that must initially be evidenced by the very nature of the overt act in order to remove a reasonable doubt from the mind of the juror but not for any other reason." In his brief on reargument (pp. 37, 40) he similarly treated the *Leiner* case as paramount authority, together with *United States* v. *Robinson*, 259 Fed. 685 (S. D. N. Y.), and *Rex* v. *Casement*, [1917] 1 K. B. 98, 86 L. J. K. B. 467.

These statements in petitioner's briefs surely warrant the assumption that he contends, or at least initially contended, for a rule which would require the overt act to comprehend the proof of the entire crime, including the essential element of treasonable intent. We believe we have shown the unreality of such a rule; as the petitioner himself now says (Rep. Br., p. 2): "It is difficult to conceive any act which in itself completely

demonstrates treasonable intent." Without formal abandonment of his original position, petitioner on the second argument (Pet. II Br., p. 40; see also Rep. Br., p. 6) adopts a new test: that an overt act must be "such an act as, when coupled with evidence of the accused's owing allegiance to the United States, and his traitorous intent, would justify submission of the case to the jury." Whether or not this test begs the question, as we have already suggested (II Br., p. 14), it clearly departs from the theory that the treason must be manifested by the act alone, "unaided by any other evidence," since it permits one of the elements of the treason—the traitorous intent—to be shown by evidence *dehors* the overt act.

2. By contrast, we have maintained a clear, consistent, and substantially unaltered position throughout the proceeding in this Court. The petitioner's statement that our "test originally propounded is accordingly completely abandoned" (Rep. Br., p. 8) is based upon a plain misreading of our second brief. The petitioner draws this conclusion from what he calls our "reaction" to his "hypothetical case of the man who, with intent to reveal information of military matters to an enemy agent, arises, has his breakfast, walks to the house in question, rings the door-bell and finally, but under the observation of but a single witness, makes the disclosure to the enemy" (Rep.

Br., p. 7). He asserts that we regard "the arising and the eating of breakfast" as "plainly insufficient," while retaining "some lingering doubts about walking down the street and ringing the door-bell" (Rep. Br., pp. 7–8).

This reading distorts the passage in our brief on reargument (pp. 64–65) in which we discussed the hypothetical case. We drew no distinction—and draw none now—between the several incidental actions enumerated by the petitioner. We referred as a group to all of them, mentioning some specifically merely for purposes of illustration. As we said, "any such incidental acts as the petitioner suggests * * * would be insignificant in the treasonable scheme—inadequately related to it in terms of purpose or effectuation".[1] We meant then, as we have meant throughout, that a given act is not a sufficient overt act of treason

[1] Petitioner again misreads our brief in stating (Rep. Br., p. 8) that "respondent seems quite satisfied" with the rule of Mr. Justice Washington in the *Pryor* case that going to the shore for provisions would not be a sufficient overt act, but "suggests that carrying provisions in the direction of the enemy 'would be very different'". The suggestion that "carrying provisions towards the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different" was not ours, but Mr. Justice Washington's; and we quoted it verbatim as such (II Br., p. 60), for the purpose of showing that, contrary to the petitioner's assertion, American judges under the Constitution have followed the English rule that treason does not require the successful giving of the intended aid and comfort.

merely because it occurs coincidentally with the existence of the treasonable scheme, or during its execution. On the other hand, a given act is not to be held insufficient merely because on its face, isolated from evidence as to its purpose and its place in the treasonable scheme, it may appear innocent or only incidental. Though each of the incidental actions enumerated by the petitioner is insufficient in the context of his hypothetical case, each could be made sufficient if, for example, it were charged and proved to have been performed as a prearranged signal to the enemy in the execution of a scheme to give him aid and comfort. In such a context it would meet our test; it would establish that the scheme of giving aid and comfort to the enemy had been placed into execution—that action was being taken to give aid and comfort to the enemy—that allegiance was being betrayed.

3. Moreover, petitioner's concentration upon the sufficiency of such incidental acts diverts attention from the real issue in this case, which is whether the particular acts here involved were sufficient. Here are no superficially innocent acts, incidental to or merely concomitant with a treasonable scheme. The acts here are the heart of treason—sufficient, we submit, by any test proposed. The petitioner here is not charged with having walked in the direction of a meeting, tied his shoelace, or raised his hand while talking. Against a background of

prearrangement and knowledge of the enemy's character as such, he is charged with having on two occasions met and conferred with the enemy for the purpose of aiding and comforting him as an enemy of the United States. He is charged with having deliberately made false statements to the authorities as to the enemy's whereabouts, identity, and mission, and as to the source and ownership of enemy funds found in his possession—all for the purpose of aiding the enemy to achieve success in war against the United States. By our standard such acts, when all the evidence is in, show clearly that the scheme of giving aid and comfort to the enemy is no longer inchoate, resting merely in intent, but has been placed into execution. When the petitioner met and conferred with the enemy he gave him aid and comfort. So he did also when he made false statements to the authorities about him and for him. That the aid and comfort given did not produce success for the enemy's mission is immaterial; the petitioner may not have done all he intended, but he did all he could.

If any meaning is to be given to the petitioner's proposed test, we submit that it too is equally clearly met. That test rests upon sufficiency of the evidence to justify submission of the case to the jury. Here evidence was presented that petitioner owed allegiance to the United States; that he intended specifically to adhere to the enemy,

giving him aid and comfort; that having that intention and purpose, he met and conferred with the enemy, knowing him to be such, and sought to divert suspicion from him by false statements to the authorities. If such acts do not in the strictest sense "manifest" the treason, they at the very least "give color and credence to the existence of the treasonable design"—petitioner's stated understanding of the test followed by Judge Hand and Lord Chief Justice Reading (Rep. Br., p. 3). For such "color and credence" cannot be required to be given in the abstract; they must be "color and credence" in the eyes of someone—either the witnesses who saw and testified to the acts, or the jury, or both. Whichever it is, the test is satisfied here. Had the meetings charged been aboard a German submarine, bearing enemy insignia on its side in open view, the "color and credence" which they would give to the existence of the treasonable design would be scarcely open to question. Here, instead of meetings aboard a submarine known to the defendant, the witnesses and the jury to be an enemy vessel, we have meetings on land with a man known to the defendant, the witnesses and the jury to be an enemy agent just disembarked from an enemy submarine. By what standard can it be said that proof of such meetings, conducted under such circumstances, is as a matter of law insufficient to

warrant the jury in finding that aid and comfort were given to the enemy?

The petitioner's answer to this question, apparently, is that past discussions of treason have not included these particular acts in illustrative catalogues of treasonable offenses. But it is not sufficient, we submit, to draw upon archaic instances of treason mentioned by the early text-writers, and to argue from the instances that they comprise the whole of treason. Nor does the Pennsylvania statute's enumeration of particular acts as treasonable serve to limit the acts which may be treason under our Constitution. The fair inference is rather to the contrary; having as models the Pennsylvania and other statutes of enumeration, the framers chose to disregard them, and to include within treason *any* act of adherence, giving aid and comfort—without limitation to particular acts. It was natural that they should do so; they were not enacting a statute, which could be changed at the will of the legislature to conform to changing conditions; they were enacting a permanent constitutional limitation upon the power of the legislature. Wisely, and typically, they used language broad enough and flexible enough to cover any aid and comfort to the enemy, whatever form it might take.

Here the conduct took, as we pointed out in our second brief, the form of actions perfectly adapted to aiding and comforting the enemy in

a modern mission of industrial sabotage. Had Thiel and his German superiors planned in advance—as well they may have done—the details of the mission during its first few days, they could hardly have planned or hoped for more than that Thiel should find at the outset a sympathetic friend, willing to meet him, talk with him about his mission without reporting him, take and hide his money for him, and conceal his identity from any authorities who might become suspicious about him. This is the aid and comfort given: all that at this stage of the mission the enemy could reasonably have hoped or desired. The precise overt acts charged—meeting and conferring with a known enemy, and making false statements to the authorities on his behalf—are the heart of this aid and comfort. They are not incidental to or merely concurrent with the treasonable aid and comfort—they are the treasonable aid and comfort. Neither history nor policy, we submit, justifies artificially restricting the broad words of the Constitution to exclude them from the crime of treason.

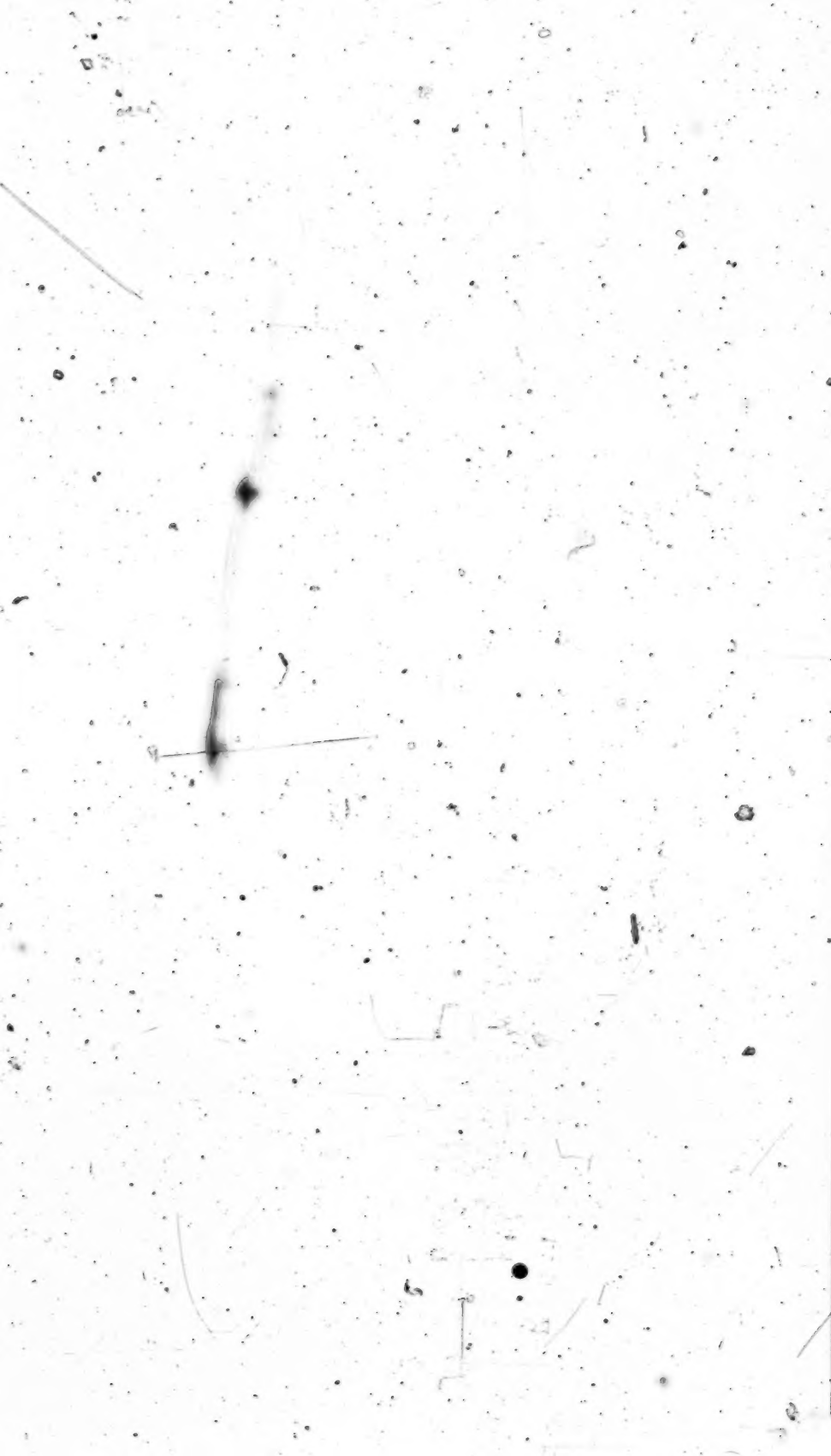
Respectfully submitted.

CHARLES FAHY,
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SUPREME COURT OF THE UNITED STATES.

No. 13.—October Term, 1944.

Anthony Cramer, Petitioner, vs. The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 23, 1945.]

Mr. Justice Jackson delivered the opinion of the Court.

Anthony Cramer, the petitioner, stands convicted of violating Section 1 of the Criminal Code, which provides: "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort, within the United States or elsewhere, is guilty of treason."[1]

Cramer owed allegiance to the United States. A German by birth, he had been a resident of the United States since 1925 and was naturalized in 1936. Prosecution resulted from his association with two of the German saboteurs who in June 1942 landed on our shores from enemy submarines to disrupt industry in the United States and whose cases we considered in *Ex parte Quirin*, 317 U. S. 1. One of those, spared from execution, appeared as a government witness on the trial of Cramer. He testified that Werner Thiel and Edward Kerling were members of that sabotage crew, detailed their plot, and described their preparations for its consummation.

Cramer was conscripted into and served in the German Army against the United States in 1918. After the war he came to this country, intending to remain permanently. So far as appears, he has been of good behavior, never before in trouble with the law. He was studious and intelligent, earning $45 a week for work in a boiler room and living accordingly.

There was no evidence, and the Government makes no claim, that he had foreknowledge that the saboteurs were coming to this country or that he came into association with them by prearrangement. Cramer, however, had known intimately the saboteur Werner Thiel while the latter lived in this country. They had worked to-

[1] 18 U. S. C. § 1, derived from Act of April 30, 1790, c. 9, § 1, 1 Stat. 112.

gether, roomed together, and shortly had ventured in a small and luckless speculation enterprise. Thiel early and frankly avowed adherence to the National Socialist movement in Germany, he foresaw the war and returned in 1941 for the purpose of helping Germany. Cramer did not do so. How much he sympathized with the doctrines of the Nazi Party is not clear. He became at one time, in Indiana, a member and officer of the Friends of New Germany which was a predecessor of the Bund. However, he withdrew in 1935 before it became the Bund. He says there was some swindle about it that he did not like and also that he did not like their drilling and "radical activities." In 1936 he made a trip to Germany, attended the Olympic Games, and saw some of the Bundsmen from this country who went there at that time for conferences with Nazi Party officials. There is no suggestion that Cramer while there had any such associations. He does not appear to have been regarded as a person of that consequence. His friends and associates in this country were largely German. His social life in New York City, where he recently had lived, seems to have been centered around Kolping House, a German-Catholic recreational center.

Cramer retained a strong affection for his fatherland. He corresponded in German with his family and friends there. Before the United States entered the war he expressed strong sympathy with Germany in its conflict with other European powers. Before the attack upon Pearl Harbor, Cramer openly opposed participation by this country in the war against Germany. He refused to work on war materials. He expressed concern about being "drafted" into our army and "misused" for purposes of "world conquest." There is no proof, however, except for the matter charged in the indictment, of any act or utterance disloyal to this country after we entered the war.

Coming down to the time of the alleged treason, the main facts, as related on the witness stand by Cramer, are not seriously in dispute. He was living in New York and in response to a cryptic note left under his door, which did not mention Thiel, he went to the Grand Central Station. There Thiel appeared. Cramer had supposed that Thiel was in Germany, knowing that he had left the United States shortly before the war to go there. Together they went to public places and had some drinks. Cramer denies that Thiel revealed his mission of sabotage. Cramer said to Thiel that he must have come to America by submarine, but Thiel refused to

confirm it, although his attitude increased Cramer's suspicion. Thiel promised to tell later how he came to this country. Thiel asked about a girl who was a mutual acquaintance and whom Thiel had engaged to marry previous to his going to Germany. Cramer knew where she was, and offered to and did write to her to come to New York, without disclosing in the letter that Thiel had arrived. Thiel said that he had in his possession about $3600, but did not disclose that it was provided by the German Government, saying only that one could get money in Germany if he had the right connections. Thiel owed Cramer an old debt of $200. He gave Cramer his money belt containing some $3600, from which Cramer was to be paid. Cramer agreed to and did place the rest in his own safe deposit box, except a sum which he kept in his room in case Thiel should want it quickly.

After the second of these meetings Thiel and Kerling, who was present briefly at one meeting, were arrested. Cramer's expectation of meeting Thiel later and of bringing him and his fiancée together was foiled. Shortly thereafter Cramer was arrested, tried, and found guilty. The trial judge at the time of sentencing said:

"I shall not impose the maximum penalty of death. It does not appear that this defendant Cramer was aware that Thiel and Kerling were in possession of explosives or other means for destroying factories and property in the United States or planned to do that.

"From the evidence it appears that Cramer had no more guilty knowledge of any subversive purposes on the part of Thiel or Kerling than a vague idea that they came here for the purpose of organizing pro-German propaganda and agitation. If there were any proof that they had confided in him what their real purposes were, or that he knew, or believed what they really were, I should not hesitate to impose the death penalty."

Cramer's case raises questions as to application of the Constitutional provision that "Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[2]

Cramer's contention may be well stated in words of Judge Learned Hand in *United States* v. *Robinson*:[3]

[2] Article III, Section 3.

[3] 259 Fed. 685, 690 (S. D. N. Y. 1919).

"Nevertheless a question may, indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent. It is true that in prosecutions for conspiracy under our federal statute it is well settled that any step in performance of the conspiracy is enough, though it is innocent except for its relation to the agreement. I doubt very much whether that rule has any application to the case of treason, where the requirement affected the character of the pleading and proof, rather than accorded a season of repentance before the crime should be complete. Lord Reading in his charge in Casement's Case uses language which accords with my understanding:

"'Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.'"[4]

The Government, however, contends for, and the court below has affirmed, this conviction upon a contrary principle.[5] It said "We believe in short that no more need be laid for an overt act of treason than for an overt act of conspiracy. . . . Hence, we hold the overt acts relied on were sufficient to be submitted to the jury, even though they perhaps may have appeared as innocent on their face." A similar conclusion was reached in *United States v. Fricke*,[6] it is: "An overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime."

As lower courts thus have taken conflicting positions, or, where the issue was less clearly drawn, have dealt with the problem ambiguously,[7] we granted certiorari[8] and after argument at the October 1943 Term we invited reargument addressed to specific ques-

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[4] This view was recently followed by Judge Clancy in District Court, in dismissing an indictment for treason. United States v. Leiner, S. D. N. Y. 1943 (unreported).

[5] United States v. Cramer, 137 F. 2d 888, 896.

[6] 259 Fed. 673, 677 (S. D. N. Y. 1919).

[7] "An overt act, in criminal law, is an outward act done in pursuance and in manifestation of an intent or design; an overt act in this case means some physical action done for the purpose of carrying out or affecting [sic] the treason." United States v. Haupt, 47 F. Supp. 836, 839 (N. D. Ill. 1942), reversed on other grounds, 136 F. 2d 661 (C. C. A. 7th, 1943).

"The overt act is the doing of some actual act, looking towards the accomplishment of the crime." United States v. Stephan, 50 F. Supp. 738, 742-43 n. (E. D. Mich. 1943).

[8] 320 U. S. 730.

tions.[2] Since our primary question here is the meaning of the Constitutional provision, we turn to its solution before considering its application to the facts of this case.

I.

When our forefathers took up the task of forming an independent political organization for New World society, no one of them appears to have doubted that to bring into being a new government would originate a new allegiance for its citizens and inhabitants. Nor were they reluctant to punish as treason any genuine breach of allegiance, as every government time out of mind had done. The betrayal of Washington by Arnold was fresh in mind. They were far more awake to powerful enemies with designs on this continent than some of the intervening generations have been. England was entrenched in Canada to the north and Spain had repossessed Florida to the south, and each had been the scene of invasion of the Colonies; the King of France had but lately been dispossessed in the Ohio Valley; Spain claimed the Mississippi Valley; and, except for the seaboard, the settlements were surrounded by Indians—not negligible as enemies themselves, and especially threatening when allied to European foes. The proposed national government could not for some years become firmly seated in the tradition or in the habits of the people. There is no evidence that the forefathers intended to withdraw the treason offense from use as an effective instrument of the new nation's security against treachery that would aid external enemies.

The forefathers also had suffered from disloyalty. Success of the Revolution had been threatened by the adherence of a considerable part of the population to the King. The Continental Congress adopted a resolution after a report by its "Committee on Spies"[10] which in effect declared that all persons residing within

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[2] — U. S. — Counsel for petitioner, although assigned by the trial court, as responded with extended researches. The Solicitor General engaged scholars not otherwise involved in conduct of the case to collect and impartially to summarize statutes, decisions, and texts from Roman, Continental, and Canon law as well as from English, Colonial, and American law sources. The part of the study dealing with American materials has been made available through publication in 58 Harv. L. Rev. 226 *et seq.* Counsel have lightened our burden of examination of the considerable accumulation of historical materials.

[10] The Committee included John Adams, Thomas Jefferson, John Rutledge, James Wilson, and Robert Livingston. See C. F. Adams, Life of John Adams in 1 Works of John Adams (1856) 224-25.

any colony owed allegiance to it, and that if any such persons adhered to the King of Great Britain, giving him aid and comfort, they were guilty of treason, and which urged the colonies to pass laws for punishment of such offenders "as shall be provably attainted of open deed."[11] Many of the colonies complied, and a variety of laws, mostly modeled on English law, resulted.[12] Some

11 *Resolved*, That all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons, passing through, visiting, or make [sic] a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto:

"That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony:

"That it be recommended to the legislatures of the several United Colonies, to pass laws for punishing, in such manner as to them shall seem fit, such persons before described, as shall be proveably attainted of open deed, by people of their condition, of any of the treasons before described." 5 Journals of the Continental Congress (1906) 475.

12 Nine states substantially adopted the recommendation of the Congress: Delaware, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Virginia. (The Virginia law, though it did not copy in full the recommendation of Congress, was drawn by Jefferson, among others, and hence probably can be regarded as originating in the same source as the others.) Three states had basic treason statutes not patterned on the Congressional model, one antedating the latter: Connecticut, Maryland, South Carolina. Georgia is not found to have enacted any general treason statute, although it passed a number of separate acts of attainder.

The Maryland act declared that "the several crimes aforesaid shall receive the same constructions that have been given to such of the said crimes as are enumerated in the statute of Edward the third, commonly called the statute of treasons." None of the statutes contained negative language, limiting the definition of treason expressly to that set forth in the statute. In general, too, they added to the definition of the model recommended by Congress other specific kinds of treason. Thus a number defined treason as including conspiracy to levy war. Conspiracy to adhere to the enemy and give aid and comfort was also included in several, or incorporated by separate acts. Much explicit attention was given to the problem of contact with the enemy. Conveying of intelligence or carrying on of correspondence with the enemy were expressly mentioned. One typical provision declared guilty of treason those persons who were "adherent to . . . the enemies of this State within the same, or to the Enemies of the United States . . . giving to . . . them Aid or Comfort, or by giving to . . . them Advice or Intelligence either by Letters, Messages, Words, Signs or Tokens, or in any way whatsoever, or by procuring for, or furnishing to . . . them any Kind of Provisions or Warlike Stores . . . ." Other provisions referred to "joining their Armies," "inlisting or persuading others to inlist for that Purpose," "furnishing Enemies with Arms or Ammunition, Provision or any other Articles for such their Aid or Comfort," "wilfully betraying, or voluntarily yielding or delivering any vessel belonging to this State or the United States to the Enemies of the United States of America"; and to persons who "have joined, or shall hereafter join the Enemies of this State, or put themselves under the Power and Protection of the said Enemies, who shall come into this State and not

of the legislation in later years became so broad and loose as to make treason of mere utterance of opinion.[13] Many a citizen in a time of unsettled and shifting loyalties was thus threatened under English law which made him guilty of treason if he adhered to the government of his colony and also under colonial law which made him guilty of treason if he adhered to his King.[14] Not a few of these persons were subjected to confiscation of property or other harsh treatment by the Revolutionists under local laws; none, however, so far as appears, to capital punishment.[15]

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or plunder any Person or Persons of their Goods and Effects, or shall burn any Dwelling House or other Building; or be aiding or assisting therein," or who should maliciously and with an intent to obstruct the service dissuade others from enlisting, or maliciously spread false rumors concerning the forces of either side such as to alienate the affections of the people from the Government "or to terrify or discourage the good Subjects of this State, or to dispose them to favor the Pretensions of the Enemy," or who "shall take a Commission or Commissions from the King of Great Britain, or any under his Authority, or other the Enemies of this State, or the United States of America."

A number of the statutes required "the testimony of two lawful and credible witnesses." But the requirement was not linked to the proof of overt acts, and there was no suggestion of the type of provision later embodied in the Constitution. Supplementary acts creating special treasonable offenses tended to omit any requirement as to quantum of proof.

See Hurst, *op cit. supra*, 58 Harv. L. Rev. at 248 *et seq.*

[13] For example, the New York Act of March 30, 1781, after reciting that it was necessary to make further provision respecting treason in order to prevent adherence to the king, made it a felony to declare or maintain "that the King of Great Britain hath, or of Right ought to have, any Authority, or Dominion, in or over this State, or the Inhabitants thereof," or to persuade or attempt to persuade any inhabitant to renounce allegiance to the State or acknowledge allegiance to the king, or to affirm one's own allegiance to the king. A person convicted was to "suffer the Pains and Penalties prescribed by Law in Cases of Felony without Benefit of Clergy," except that the court might, instead of prescribing death, sentence to three years' service on an American warship. Laws of the State of New York (Poughkeepsie, 1782) 4th Sess., Ch. XLVIII. Virginia imposed a fine not exceeding £20,000, and imprisonment up to five years "if any person residing or being within this commonwealth shall . . . by any word, open deed, or act, advisedly and willingly maintain and defend the authority, jurisdiction, or power, of the king or parliament of Great Britain, heretofore claimed and exercised within this colony, or shall attribute any such authority, jurisdiction, or power, to the king or parliament of Great Britain. . . ." Laws, October, 1776, Ch. V, 9 Hening, Statutes at Large (1823) 170. See also Hurst, *op. cit. supra*, 58 Harv. L. Rev. at 265-67.

[14] A similar situation prevailed during the Civil War, when treason prosecutions were instituted against citizens of some southern states for treason to the state, consisting of adherence to the United States. See Robinson, Justice in Grey, pp. 176, 199, 201, 202, 270, 289, 380, 385, 408.

[15] See Hurst, *Treason in the United States* (1944) 58 Harv. L. Rev. 226, 268-71. Although these acts, dealing with withdrawal to enemy territory, imposed in general only forfeiture and banishment, some did reinforce these penalties with the threat of death if the person should later be found within the state. *Id.*, 272.

Before this revolutionary experience there were scattered treason prosecutions in the colonies[16] usually not well reported. Some colonies had adopted treason statutes modeled on English legislation.[17] But the earlier colonial experience seems to have been regarded as of a piece with that of England and appears not to have much influenced the framers in their dealings with the subject:

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[16] The only pre-Revolutionary treason trial of which there is an extensive record is King v. Bayard (1702), a New York prosecution under an Act of May 6, 1691, which made it treason "by force of arms or otherwise to disturb the peace good and quiet of this their Majestyes Government as it is now Established." (The act was thought by the home authorities to be objectionably broad and vague and was later repealed.) See The Trial of Nicholas Bayard, 14 Howell's State Trials 471; 10 Lawson, American State Trials 518; Hurst, *op. cit. supra*, 58 Harv. L. Rev. at 223. For other material on colonial treason prosecutions, see Hurst, *op cit. supra*, 58 Harv. L. Rev. at 234, n. 15.

[17] In the early part of the colonial period, charters and grants gave royal governors authority to use martial law for suppression of "rebellion," "sedition," and "mutiny," and references to treason were not in the traditional language. A provision of the General Laws of New Plimouth Colony, 1671, is representative:

"3. Treason against the Person of our Soveraign Lord the King, the State and Common-wealth of England, shall be punished by death.

"4. That whosoever shall Conspire and Attempt any Invasion, Insurrection, or Publick Rebellion against this Jurisdiction, or the Surprizal of any Town, Plantation, Fortification or Ammunition, therein provided for the safety thereof, or shall Treacherously and Perfidiously Attempt and Endeavor the Alteration and Subversion of the Fundamental Frame and Constitutions of this Government; every such Person shall be put to Death."

But the bulk of colonial legislation prior to the Revolution drew extensively on English law, especially the statute 25 Edward III. Some of the acts substantially adopted the language of the latter statute, with additions, and some simply declared that the offense of treason should follow the English law. With the exception of Georgia and New Jersey, all the colonies eventually adopted one or the other type statute. In addition, the English law of treason itself applied, to an undefined extent, and several colonial acts were disallowed on the theory that they covered ground already occupied by the mother country's legislation. The colonies which enacted their own statutes patterned after 25 Edward III did not narrow its terms. Several expressly included the treason of compassing the death of the king, and a couple even made an analogous offense of compassing the death of the proprietor. The offense of levying war against the king was given a broad definition; some of the colonies expressly included various forms of "constructive" levying of war which had been put into the English statute by judicial construction, in general extending the crime to domestic disturbances; and some of the statutes made conspiracy to levy war sufficient to constitute the crime of levying war. Some specific attention was given, in separate legislation at various times to contact with the enemy, legislation comparable to that subsequently enacted during the Revolutionary period.

Most of the colonial treason acts contained two-witness requirements, without the additional qualification later adopted in the Constitution, that they must be witnesses to the same overt act, although it was required that they be witnesses to the same general kind of treason.

See generally Hurst, *op. cit. supra*, 58 Harv. L. Rev. at 226-45.

However, their experience with treason accusations had been many-sided. More than a few of them were descendants of those who had fled from measures against sedition and its ecclesiastic counterpart, heresy. Now the treason offense was under revision by a Convention whose members almost to a man had themselves been guilty of treason under any interpretation of British law.[18] They not only had levied war against their King themselves, but they had conducted a lively exchange of aid and comfort with France, then England's ancient enemy. Every step in the great work of their lives from the first mild protests against kingly misrule to the final act of separation had been taken under the threat of treason charges.[19] The Declaration of Independence may seem cryptic in denouncing George III "for transporting us beyond Seas to be tried for pretended offenses" but the specific grievance was recited by the Continental Congress nearly two years before in saying that ". . . it has lately been resolved in Parliament, that by force of a statute, made in the thirty-fifth year of the reign of king Henry the eighth, colonists may be transported to England, and tried there upon accusations for treasons, and misprisions, or concealments of treasons committed in the colonies; and by a late statute, such trials have been directed in cases therein mentioned."[20]

The Convention numbered among its members men familiar with government in the Old World, and they looked back upon a long history of use and abuse of the treason charge.[21] The English

[18] "The men who framed the instruments remembered the crimes that had been perpetrated under the pretense of justice; for the most part they had been traitors themselves, and having risked their necks under the law they feared despotism and arbitrary power more than they feared treason." 3 Adams, History of the United States, 468.

"Every member of that Convention—every officer and soldier of the Revolution from Washington down to private, every man or woman who had given succor or supplies to a member of the patriot army, everybody who had advocated American independence . . . could have been prosecuted and convicted as 'traitors' under the British law of constructive treason." 3 Beveridge, Life of John Marshall, 402, 403.

[19] This was doubtless the meaning of Franklin's quip at the signing of the Declaration of Independence that if the signers did not hang together they should hang separately. It was also the meaning of the cries of "Treason" which interrupted Patrick Henry in the speech in the Virginia House of Burgesses evoking the famous reply "If this be treason, make the most of it."

[20] 1 Journals of the Continental Congress, 65. See also 1 Burnett, ed., Letters of Members of the Continental Congress (1921) 43, 44, n. 3.

[21] The men who were responsible for framing our Constitution were influenced by eighteenth century liberal thought from both French and English sources. French influences, more philosophical than legal in character, were particularly strong with Franklin, who took a significant part in framing the

stream of thought concerning treasons began to flow in fairly definable channels in 1351 with the enactment of the great Treason Act, 25 Edw. III, Stat. 5, Ch. 2.[22] That was a monumental piece

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treason clause. Franklin had been a member of the French Academy of Sciences since 1772 and had many friends among French intellectuals. He spent much time in England and in France, to which he was sent by the Continental Congress as Commissioner in 1776. He remained until 1783, when he signed the Treaty of Peace with England, and thereafter until 1785 as Minister to France. Becker, *Franklin*, 6 Dictionary of American Biography 585; 9 Encyclopedia Britannica (14th ed.) 693. Jefferson, a strong influence with the men of that period, was sent to France by the Continental Congress to assist Franklin, remaining there from 1784 to 1789, succeeding Franklin in 1785 as Minister. Jefferson was so closely in touch with French revolutionary thought that in July 1789 he was invited to assist in the deliberations of the Committee of the French National Assembly to draft a Constitution, but declined out of respect for his position. See Malone, *Jefferson*, 10 Dictionary of American Biography 17; 12 Encyclopedia Britannica (14th ed.) 988. See also, generally, Chinard, Thomas Jefferson, The Apostle of Americanism. Best known in America of the French writings was Montesquieu's L'Esprit des Lois, which appeared in French in 1748. (An English edition was published in London in 1750.) Book 12 thereof was devoted to his philosophical reactions to the abuses of treason. It is hardly a coincidence that the treason clause of the Constitution embodies every one of the precepts suggested by Montesquieu in discussing the excesses of ancient and European history.

Some of his precepts were: "If the crime of high treason be indeterminate, this alone is sufficient to make the government degenerate into arbitrary power." (Book 12, Ch. 7, Of the Crime of High Treason.) "The laws do not take upon them to punish any other than overt acts." (Book 12, Ch. 11, Of Thoughts.) "Nothing renders the crime of high treason more arbitrary than declaring people guilty of it for indiscreet speeches. . . . Words do not constitute an overt act; they remain only in idea. . . . Overt acts do not happen every day; they are exposed to the eye of the public; and a false charge with regard to matters of fact may be easily detected. Words carried into action assume the nature of that action. Thus a man who goes into a public market place to incite the subject to revolt, incurs the guilt of high treason, because the words are joined to the action, and partake of its nature. It is not the words that are punished but an action in which the words are employed." (Book 12, Ch. 12, Of indiscreet Speeches.) "Those laws which condemn a man to death on the deposition of a single witness, are fatal to liberty." (Book 12, Ch. 3, Of The Liberty of the Subject.)

Both French and English influences on American thought as shown by Jefferson's writings are traced by Perry, Puritanism and Democracy (1945) 126, 130, 134, 158, 182, 184, 185.

[22] "*Declaration what offenses shall be adjudged treason.* Item, whereas divers opinions have been before this time in what case treason shall be said and in what not; the King, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth, that is to say, when a man doth compass or imagine the death of our lord the King, of our lady his queen or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife the King's eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be probably attainted of open deed by the people of their condition: *And if a man counterfeit the King's great or privy seal, or his money; and if a man bring*

of legislation several times referred to in the deliberations of the Convention. It set a bench-mark by which the English-speaking world tested the level of its thought on the subject[23] until our own

false money into this realm, counterfeit to the money of England, as the money called lushburgh, or other, like to the said money of England, knowing the money to be false, to merchandise or make payment in deceit of our said lord the King and of his people; and if a man slea the chancellor, treasurer, or the King's justices of the one bench or the other, justices in eyre, or justices of assise, and all other justices assigned to hear and determine, being in their places, doing their offices: and it is to be understood, that in the cases above rehearsed, that ought to be judged treason which extends to our lord the King, and his royal majesty: And of such treason the forfeiture of the escheats pertaineth to our sovereign lord, as well as of the lands and tenements holden of other, as of himself: *And moreover there is another manner of treason, that is to say, when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate, to whom he oweth faith and obedience; and of such treason the escheats ought to pertain to every lord of his own fee.* And because that many other like cases of treason may happen in time to come, which a man cannot think or declare at this present time; it is accorded, that if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgement of the treason, till the cause be shewed and declared before the King and his Parliament, whether it ought to be judged treason or other felony. And if percase any man of this realm ride armed covertly or secretly with men of arms against any other, to slay him, or rob him, or take him, or retain him till he hath made fine or ransom for to have his deliverance, it is not the mind of the King nor his council, that in such case it shall be judged treason but shall be judged felony or trespass, according to the laws of the land of old time used, and according as the case requireth." 4 Halsbury's Statutes of England 273.

[23] Stephen said of it: "In quiet times it is seldom put in force, and if by any accident it is necessary to apply it, the necessity for doing so is obvious. For revolutionary periods it is obviously and always insufficient, and at such times it is usually supplemented by enactments which ought to be regarded in the light of war measures, but which are usually represented by those against whom they are directed as monstrous invasions of liberty. The struggle being over, the statute of 25 Edw. 3 is reinstated as the sole definition of treason, and in this way it has become the subject of a sort of superstitious reverence." 2 Stephen, History of the Criminal Law of England (1883) 250-51; see also, 3 Holdsworth (4th ed. 1935) 287.

Blackstone says: "But afterward, between the reigns of Henry the Fourth and Queen Mary, and particularly in the bloody reign of Henry the Eighth, the spirit of inventing new and strange treasons was revived; among which we may reckon the offenses of clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; willful poisoning; conspirations against the king; calling him opprobrious names by public writ; counterfeiting the sign-manual or signet; refusing to abjure the pope; following or marrying, without the royal license, any of the king's children, sisters, aunts, nephews, or nieces; base solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing* (manifested by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal style and title; and impugning his supremacy; and assembling riotously to the number of twelve, and not dispersing upon proclamation;" Blackstone 86-87.

abrupt departure from it in 1789, and after 600 years it still is the living law of treason in England. Roger Casement in 1917 forfeited his life for violating it.[24] We, of course, can make no independent judgment as to the inward meanings of the terms used in a six-century-old statute, written in a form of Norman French that had become obsolete long before our Revolution. We can read this statute only as our forebears read it—through the eyes of succeeding generations of English judges, to whom it has been the core of all decision, and of common-law commentators, to whom it has been the text.[25]

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[24] Rex v. Casement, 1 K. B. 98 (1917); Knott, Trial of Roger Casement, 184; 185.

[25] Chief among these were Coke and Blackstone. Coke emphasized the salutary effects of the Statute of Edward III in limiting treason prosecution and strongly emphasized the overt act requirement, probably quoting Bracton. Institutes of the Laws of England, 5th Ed. (1671) Part III, 14. He used as examples overt acts which of themselves appear to evidence treasonable intent. *Id.*, 2, 3, and 14. See 1 Hale, History of the Pleas of the Crown (1736) 86, 259. But we cannot be sure whether this was intended to imply that acts from which intent would be less evident would suffice. Others authors known on this side of the water leave us with little light on our particular problem.

Hale (History of the Pleas of the Crown, Emlyn ed. London, 1736) frequently uses terminology found in Coke and earlier writers, which might mean that the function of an overt act is to prove intent, saying that the overt act is to "manifest" or "declare" the compassing of the king's death, and so forth. *Id.*, 109. But, as in the other writers, the statements are usually open as well to the interpretation that the act must show translation of thought into action. In the latter sense, the act "declares" intent in that it shows, in the light of other evidence, that the defendant's thoughts were not mere idle desires. This is a different thing from saying that the overt act must of itself display an unambiguously traitorous character. Elsewhere Hale gives some support to the view that the act may itself be of an innocent character. Dealing with the principle that words alone cannot be an overt act, he says that words may expound an overt act to make good an indictment of treason of compassing the king's death, which overt act possibly of itself may be indifferent and unapplicable to such an intent; and therefore in the indictment of treason they may be joined with such an overt act, to make the same applicable and expositive of such a compassing. *Id.*, 115. He also declares that the mere meeting of persons with the intent of plotting the king's death is a sufficient overt act for the treason of compassing the king's death. *Id.*, 108, 109. These remarks, however, deal only with compassing the king's death, and little light is given as to the overt act in connection with levying war and adhering to the enemy. With Coke, Hale takes the position that a mere meeting of persons to conspire, though sufficient under the compassing clause, is not sufficient for the levying of war clause. *Id.*, 130.

Foster's view of the overt act does not seem materially different from Hale's. (A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746 in the County of Surry; and of other Crown Cases, 2d ed. 1791.) "Overt acts undoubtedly do discover the man's intentions; but, I conceive, they are not to be considered merely as evidence

Adjudicated cases in English history generally have dealt with the offense of compassing the monarch's death; only eleven reported English cases antedating the Constitution are cited as involving distinct charges of adherence to the King's enemies.[26] When constructive treasons were not joined on the face of the indictment, it is not possible to say how far they were joined in the minds of the judges. No decision appears to have been a factor in the deliberations of our own Constitutional Convention. Nor does any squarely meet our issue here, and for good reason—the Act of Edward III did not contain the two-witnesses-to-the-same-overt act requirement which precipitates the issue here.

Historical materials are, therefore, of little help; necessity as well as desire taught a concept that differed from all historical models in the drafting of our treason clause. Treason statutes theretofore had been adapted to a society in which the state was personified by a king, on whose person were focused the allegiances and loyalties of the subject. When government was made representative of the whole body of the governed there was none to say "I am the State" and a concept of treason as compassing or imagining a ruler's death was no longer fitting. Nor can it be gainsaid that the revolutionary doctrine that the people have the right to alter or abolish their government relaxed the loyalty which governments theretofore had demanded—dangerously diluted it, as the ruling classes of Europe thought, for in their eyes the colonists not only com-

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but as the *means made use of to effectuate the purposes of the heart*. . . . though in the case of the King overt acts of less malignity, and having a more remote tendency to his destruction, are, with great propriety, deemed treasonable; yet still they are considered as *'means to effectuate* [sic], not merely *as evidence* of the treasonable purpose.'" Foster also repeats the assertion that the mere meeting of persons with intent to plan the king's death is a sufficient overt act. *Id.*, 195. However, his discussion, too, is confined to the treason of compassing, and he says little that is helpful about levying war and adhering.

[26] These are: Trial of Sir Nicholas Throckmorton, 1 How. St. Tr. 869 (1 Mary, 1554); Trial of Sir Richard Grahme (Lord Preston's Case), 12 How. St. Tr. 645 (2 William and Mary, 1691); Trial of Sir John Freind, 13 How. St. Tr. 1, 4, 11 (8 William III, 1696); Trial of Sir William Parkyns, 13 How. St. Tr. 63, 67 (8 William III, 1696); Trial of Peter Cook, 13 How. St. Tr. 311, 346 (8 William III, 1696); Trial of Captain Vaughan, 13 How. St. Tr. 485, 488 (8 William III, 1696); Trial of William Gregg, 14 How. St. Tr. 1371 (6 Anne, 1708); Trial of James Bradshaw, 18 How. St. Tr. 415 (20 George II, 1746); Trial of Dr. Henson, 19 How. St. Tr. 1341 (32 George II, 1758); Trial of Francis De la Motte, 21 How. St. Tr. 687 (21 George III, 1781); and the Trial of David Tyrie, 21 How. St. Tr. 815 (22 George III, 1782).

mitted treason, they exalted it.[27] The idea that loyalty will ultimately be given to a government only so long as it deserves loyalty and that opposition to its abuses is not treason[28] has made our government tolerant of opposition based on differences of opinion that in some parts of the world would have kept the hangman busy. But the basic law of treason in this country was framed by men who, as we have seen, were taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself. The interplay in the Convention of their two fears accounts for the problem which faces us today.

II.

We turn then to the proceedings of the Constitutional Convention of 1787 so far as we have record of them. The plan presented by Pinckney evidently proposed only that Congress should have exclusive power to declare what should be treason and misprision of treason against the United States.[29] The Committee on Detail, apparently not specifically instructed on the subject, reported a draft Constitution which left no such latitude to create new treasons. It provided that: "Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses.

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[27] Philip Guedalla characterizes the figures of the American Revolution as they occur in British legend: "There they are oddly shrunken; they dwindle into a provincial pettiness; and their voices monotonously intone the dreary formulæ of sedition." Fathers of the Revolution, p. 8.

[28] Mr. Jefferson had referred to the Statute of Edward III as "done to take off the lands of tyrannical Kings, and of weak and wicked Ministers that deadly weapon, which constructive treason had furnished them with, and which had drawn the blood of the best and honestest men in the kingdom." Writings of Thomas Jefferson (Library ed. 1903) 215.

Later, as Secretary of State, he wrote: "Treason . . . when real, merits the highest punishment. But most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government*, and acts against the *oppressions of the government*; the latter are virtues; yet they have furnished more victims to the executioner than the former; because real treasons are rare; oppressions frequent. The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries." 8 Jefferson's Writings 382. Compare 7 Annual Message, 1807, 3 Jefferson's Writings 451, 452.

[29] 2 Farrand, Records of the Federal Convention of 1787, 136.

No attainder of treason shall work corruption of bloods, nor forfeiture, except during the life of the person attainted."[30]

This clause was discussed on August 20, 1787. Mr. Madison, who opened the discussion, "thought the definition too narrow. It did not appear to go as far as the Stat. of Edwd III. He did not see why more latitude might not be left to the Legislature. It wd. be as safe in the hands of State legislaturgs; and it was inconvenient to bar a discretion which experience might enlighten, and which might be applied to good purposes as well as be abused."[31] Mr. Mason was in favor of following the language of the Statute of Edward III. The discussion shows some confusion as to the effect of adding the words "giving them aid and comfort," some thinking their effect restrictive and others that they gave a more extensive meaning. However, "Col Mason moved to insert the words 'giving (them) aid comfort' as restrictive of 'adhering to their Enemies, &c'—the latter he thought would be otherwise too indefinite." The motion prevailed.

Mr. Dickenson "wished to know what was meant by the 'testimony of two witnesses': whether they were to be witnesses to the same overt act or to different overt acts. He thought also that proof of an overt-act ought to be expressed as essential to the case." Doctor Johnson also "considered . . . that something should be inserted in the definition concerning overt acts."

When it was moved to insert "to the same overt act" after the two-witnesses requirement, Madison notes that "Dr. Franklin wished this amendment to take place—prosecutions for treason were generally virulent; and perjury too easily made use of against innocence." James Wilson observed that "Much may be said on both sides. Treason may sometimes be practiced in such a manner, as to render proof extremely difficult—as in a traiterous correspondence with an Enemy."[32] But the motion carried.

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[30] Art. VII, Sec. 2, of draft reported August 6, 1787. 2 Farrand 182.

[31] The debates are at 2 Farrand 345-50.

[32] James Wilson was not unlikely one of the authors of the treason clause, as a member of the Committee on Detail. He had participated in the Pennsylvania treason trials in 1778 as one of the defense counsel (Respublica v. Malin, 1 Dall. 33 (Pa. O. & T.), Respublica v. Carlisle, *id.* 35, Respublica v. Roberts, *id.* 39. In the Pennsylvania ratifying convention he made detailed statements in praise of the clause without its having been challenged. 2 Elliot, Debates, 469, 487. Later, he devoted a lecture to the clause in his law course delivered at the College of Philadelphia in 1790 and 1791. 3 Works of Hon. James Wilson (Bird Wilson, ed. 1804) 95-107.

By this sequence of proposals the treason clause of the Constitution took its present form. The temper and attitude of the Convention toward treason prosecutions is unmistakable. It adopted every limitation that the practice of governments had evolved or that political-legal philosophy to that time had advanced.[33] Limitation of the treason of adherence to the enemy to cases where aid and comfort were given and the requirement of an overt act were both found in the Statute of Edward III praised in the writings of Coke and Blackstone, and advocated in Montesquieu's *Spirit of Laws*. Likewise, the two-witness requirement had been used in other statutes,[34] was advocated by Montesquieu in all capital cases,[35] and was a familiar precept of the New Testament,[36] and of Mosaic law.[37] The framers combined all of these known protections and added two of their own which had no precedent. They wrote into the organic act of the new government a prohibition of legislative or judicial creation of new treasons. And a venerable safeguard against false testimony was given a novel application by requiring two witnesses to the same overt act.

Distrust of treason prosecutions was not just a transient mood of the Revolutionists. In the century and a half of our national existence not one execution on a federal treason conviction has taken place. Never before has this Court had occasion to review a conviction. In the few cases that have been prosecuted the treason clause has had its only judicial construction by individual Justices of this Court presiding at trials on circuit, or by district or circuit judges.[38] After constitutional requirements have been

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[33] The convention did reject proposals that the states be denied authority to define treason against themselves and that participation in a civil war between a state and the United States be excepted. See 2 Farrand 345, 349; 3 *id.* 223.

[34] See note 16, *supra*; see also 9 Holdsworth (2d ed. 1938) 202-211.

[35] 1 Esprit des Lois, Book XII, Ch. 2, III.

[36] "... take with thee one or two more; that on the mouth of two or three witnesses every word may be established." Matt. xviii. 16.

[37] "One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." Deut. xix. 15.

[38] The following is a summary, taken from the Appendix to the Government's brief, of all cases in which construction of the treason clause has been involved, omitting grand jury charges and cases in which interpretation of the clause was incidental:

Whiskey Rebellion cases: United States v. Vigol, 28 Fed. Cas. 376, No. 16,621 (C. C. D. Pa. 1795); United States v. Mitchell, 26 Fed. Cas. No. 15,788 (C. C. D. Pa. 1795) (constructive levying of war, based on forcible

satisfied, and after juries have convicted and courts have sentenced, Presidents again and again have intervened to mitigate judicial severity or to pardon entirely. We have managed to do

resistance to execution of a statute; defendants convicted and later pardoned). House tax cases: Case of Fries, 9 Fed. Cas. 826, 924, Nos. 5126, 5127, 5128 (C. C. D. Pa. 1799, 1800) (constructive levying of war, based on forcible resistance to execution of a statute; defendant convicted and later pardoned). The Burr Conspiracy. Ex parte Bollman, 4 Cranch 75 (1807); United States v. Burr, 25 Fed. Cas. 55, Nos. 14,692a, 14,693 (C. C. D. Va. 1807) (conspiracy to levy war held not an overt act of levying war). United States v. Lee, 26 Fed. Cas. 907, No. 15,584 (C. C. D. C. 1814) (sale of provisions a sufficient overt act; acquittal). United States v. Hodges, 26 Fed. Cas. 332, No. 15,374 (C. C. D. Md. 1815) (obtaining release of prisoners to the enemy is adhering to the enemy, the act showing the intent; acquittal). United States v. Hoxie, 26 Fed. Cas. 397, No. 15,407 (C. C. D. Vt. 1808) (attack of smugglers on troops enforcing embargo is riot and not levying of war). United States v. Pryor, 27 Fed. Cas. 628, No. 16,096 (C. C. D. Pa. 1814) (proceeding under flag of truce with enemy detachment to help buy provisions is too remote an act to establish adhering to the enemy). United States v. Hanway, 26 Fed. Cas. 105, No. 15,299 (C. C. E. D. Pa. 1851) (forcible resistance to execution of Fugitive Slave Law no levying of war). United States v. Greener, 26 Fed. Cas. 36, No. 15,262 (E. D. Pa. 1861) (participation as member of state militia company in seizure of a Federal fort is a levying of war). United States v. Greathouse, 26 Fed. Cas. 18, No. 15,254 (C. C. N. D. Cal. 1863) (fitting out and sailing a privateer is a levying of war; defendants convicted, later pardoned). Cases of confiscation of property or refusal to enforce obligations given in connection with sale of provisions to the Confederacy: Hanauer v. Doane, 12 Wall. 342 (1871); Carlisle v. United States, 16 Wall. 147 (1873); Sprott v. United States, 20 Wall. 459 (1874); United States v. Athens Armory, 24 Fed. Cas. 878, No. 14,473 (N. D. Ga. 1838). (Mixed motive, involving commercial profit, does not bar finding of giving aid and comfort to the enemy.) United States v. Gilbert and Parmenter, 25 Fed. Cas. 344, No. 14,756 (C. C. S. D. Ohio, 1863). Chenoweth's Case [unreported; see Ex parte Vallandigham, 28 Fed. Cas. 874, No. 16,816, at 888 (S. D. Ohio, 1863)] (indictment bad for alleging aiding and abetting rebels, instead of directly charging levying of war). Case of Jefferson Davis, 7 Fed. Cas. 63, No. 3621a (C. C. D. Va. 1867-71) (argument that rebels who got government achieved status of a recognized belligerent could not be held for treason; Davis was not tried on the indictment); see 2 Warren, Supreme Court in United States History (1934 ed.) 485-87; Watson, Trial of Jefferson Davis (1915) 25 Yale L. J. 669. Philippine insurrections: United States v. Magribay, 2 Philipp. 168 (1903); United States v. De Los Reyes, 3 Philipp. 349 (1904) (mere possession of rebel commissions insufficient overt acts; strict enforcement of two witness requirement; convictions reversed); United States v. Lagnason, 2 Philip. 472 (1903) (armed effort to overthrow the government is levying war). United States v. Fricke, 259 Fed. 673 (S. D. N. Y. 1919) (acts "indifferent" on their face held sufficient overt acts). United States v. Robinson, 259 Fed. 685 (S. D. N. Y. 1919) (dictum, acts harmless on their face are insufficient overt acts). United States v. Werner, 247 Fed. 708 (E. D. Pa. 1918), aff'd, 251 U. S. 466 (1919) (act indifferent on its face may be sufficient overt act). United States v. Haupt, 136 F. 2d 661 (C. C. A. 7th, 1943) (reversal of conviction on strict application of two-witness requirement and other grounds; inferentially approves acts harmless on their face as overt acts). Stephan v. United States, 133 F. 2d 87 (C. C. A. 6th, 1943) (acts harmless on their face may be sufficient overt acts; conviction affirmed but sentence commuted). United States v. Cramer, 137 F. 2d 888 (C. C. A. 2d, 1943).

without treason prosecutions to a degree that probably would be impossible except while a people was singularly confident of external security and internal stability.[30]

III.

Historical materials aid interpretation chiefly in that they show two kinds of dangers against which the framers were concerned to guard the treason offense: (1) perversion by established authority to repress peaceful political opposition; and (2) conviction of the innocent as a result of perjury, passion, or inadequate evidence. The first danger could be diminished by closely circumscribing the kind of conduct which should be treason—making the constitutional definition exclusive, making it clear, and making the offense one not susceptible of being inferred from all sorts of insubordinations. The second danger lay in the manner of trial and was one which would be diminished mainly by procedural requirements—mainly but not wholly, for the hazards of trial also would be diminished by confining the treason offense to kinds of conduct susceptible of reasonably sure proof. The concern uppermost in the framers' minds, that mere mental attitudes or ex-

[30] In 1942 the Office of War Information suggested to Mr. Stephen Vincent Benet a short interpretative history of the United States for translation into many languages. In it he says:

"It had been a real revolution—a long and difficult travail, full of hardship, struggle, bitterness, and the overturning of old habits and customs. But it did not eat its children and it had no aftermath of vengeance. The Hessians who stayed in the country were not hunted down and annihilated. Some loyalists who returned were harshly treated—others came back and settled down peacefully as citizens of the new state. There was neither blood bath nor purge. There was bitter political dispute—but no small group of men plotted in secret to overthrow the government by force of arms. There were a couple of minor and local revolts, based on genuine grievances—Shays' Rebellion in 1786—the Whisky Rebellion in 1794. Both collapsed when the government showed itself able to put down rebellion—and nobody was hanged for either of them. Shays and his temporary rebels received a general amnesty—the leaders of the Whisky Rebellion were convicted of treason and then pardoned by the President." Benét, America, pp. 48-50.

Speaking of the War between the States he says:

"Again, there was no blood purge. There were no mass executions. No heads rolled.

"The handful of fanatics who had plotted the assassination of Lincoln and other government leaders were executed. His actual murderer was tracked down and shot. The half crazy officer who commanded a notorious southern prison camp was hanged. The former President of the Confederacy, Jefferson Davis, was kept for a while in prison with certain of his associates and then released. But that was all.

"Not one of the great southern generals or statesmen, Lee, Johnson, Stephens, Hampton, Longstreet—was even tried for treason." *Id.*, 78.

pressions should not be treason, influenced both definition of the crime and procedure for its trial. In the proposed Constitution the first sentence of the treason article undertook to define the offense; the second, to surround its trial with procedural safeguards.

"Compassing" and like loose concepts of the substance of the offense had been useful tools for tyranny. So one of the obvious things to be put into the definition of treason not consisting of actual levying of war was that it must consist of doing something. This the draft Constitution failed to provide, for, as we have pointed out, it defined treason[40] as merely "adhering to the enemies of the United States, or any of them."

Treason of adherence to an enemy was old in the law. It consisted of breaking allegiance to one's own King by forming an attachment to his enemy. Its scope was comprehensive, its requirements indeterminate. It might be predicated on intellectual or emotional sympathy with the foe, or merely lack of zeal in the cause of one's own country. That was not the kind of disloyalty the framers thought should constitute treason. They promptly accepted the proposal to restrict it to cases where also there was conduct which was "giving them aid and comfort."

"Aid and comfort" was defined by Lord Reading in the Casement trial comprehensively, as it should be, and yet probably with as much precision as the nature of the matter will permit: "an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort" and "an act which weakens or tends to weaken the power of the King and of the country to resist, or to attack the enemies of the King and the country . . . is . . . giving of aid and comfort." Lord Reading explained it, as we think one must, in terms of an "act." It is not easy, if indeed possible, to think of a way in which "aid and comfort" can be "given" to an enemy except by some kind of action. Its very nature partakes of a deed or physical activity as opposed to a mental operation.

Thus, the crime of treason consists of two elements: adherence to the enemy; and rendering him aid and comfort. A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or

[40] Apart, of course, from levying war, which is not charged in this case and is not involved in the controversy.

interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.

Having thus by definition made treason consist of something outward and visible and capable of direct proof, the framers turned to safeguarding procedures of trial and ordained that "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." This repeats in procedural terms the concept that thoughts and attitudes alone cannot make a treason. It need not trouble us that we find so dominant a purpose emphasized in two different ways. But does the procedural requirement add some limitation not already present in the definition of the crime, and if so, what?

While to prove giving of aid and comfort would require the prosecution to show actions and deeds, if the Constitution stopped there, such acts could be inferred from circumstantial evidence. This the framers thought would not do.[41] So they added what in effect is a command that the overt acts must be established by direct evidence, and the direct testimony must be that of two witnesses instead of one. In this sense the overt act procedural provision adds something, and something important, to the definition.

Our problem begins where the Constitution ends. That instru-

[41] Hallam in his *Constitutional History of England* (1827) said: "Nothing had brought so much disgrace on the councils of government, and on the administration of justice, nothing more forcibly spoken the necessity of a great change, than the prosecutions for treason during the latter years of Charles II., and in truth during the whole course of our legal history. The statute of Edward III. and Edward VI., almost set aside by sophistical constructions, required the corroboration of some more explicit law; and some peculiar securities were demanded for innocence against that conspiracy of the court with the prosecutor, which is so much to be dreaded in all trials for political crimes." v. 2, p. 509.

Continuing, after comment on particular cases, he said: "In the vast mass of circumstantial testimony which our modern trials for high treason display, it is sometimes difficult to discern, whether the great principle of our law, requiring two witnesses to overt acts, has been adhered to; for certainly it is not adhered to, unless such witnesses depose to acts of the prisoner, from which an inference of his guilt is immediately deducible." v. 2, p. 516.

ment omits to specify what relation the indispensable overt act must sustain to the two elements of the offense as defined: viz., adherence and giving aid and comfort. It requires that two witnesses testify to the same overt act, and clearly enough the act must show something toward treason, but what? Must the act be one of giving aid and comfort? If so, how must adherence to the enemy, the disloyal state of mind, be shown?

The defendant especially challenges the sufficiency of the overt acts to prove treasonable intention. Questions of intent in a treason case are even more complicated than in most criminal cases because of the peculiarity of the two different elements which together make the offense. Of course the overt acts of aid and comfort must be intentional as distinguished from merely negligent or undesigned ones. Intent in that limited sense is not in issue here. But to make treason the defendant not only must intend the act, but he must intend to betray his country by means of the act. It is here that Cramer defends. The issue is joined between conflicting theories as to how this treacherous intention and treasonable purpose must be made to appear.

Bearing in mind that the constitutional requirement in effect is one of direct rather than circumstantial evidence, we must give it a reasonable effect in the light of its purpose both to preserve the offense and to protect citizens from its abuse. What is designed in the mind of an accused never is susceptible of proof by direct testimony. If we were to hold that the disloyal and treacherous intention must be proved by the direct testimony of two witnesses, it would be to hold that it is never provable. It seems obvious that adherence to the enemy, in the sense of a disloyal state of mind, cannot be, and is not required to be, proved by deposition of two witnesses.

Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts. The law of treason, like the law of lesser crimes, assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. Proof that a citizen did give aid and comfort to an enemy may well be in the circumstances sufficient evidence that he adhered to that enemy and intended and purposed to strike at his own

country.[42] It may be doubted whether it would be what the founders intended, or whether it would well serve any of the ends they cherished, to hold the treason offense available to punish only those who make their treacherous intentions more evident than may be done by rendering aid and comfort to an enemy. Treason—insidious and dangerous treason—is the work of the shrewd and crafty more often than of the simple and impulsive.

While of course it must be proved that the accused acted with an intention and purpose to betray or there is no treason, we think that in some circumstances at least the overt act itself will be evidence of the treasonable purpose and intent. But that still leaves us with exceedingly difficult problems. How decisively must treacherous intention be made manifest in the act itself? Will a scintilla of evidence of traitorous intent suffice? Or must it be sufficient to convince beyond reasonable doubt? Or need it show only that treasonable intent was more probable than not? Must the overt act be appraised for legal sufficiency only as supported by the testimony of two witnesses, or may other evidence be thrown into the scales to erect inferences not otherwise reasonably to be drawn or to reinforce those which might be drawn from the act itself?

It is only overt acts by the accused which the Constitution explicitly requires to be proved by the testimony of two witnesses. It does not make other common-law evidence inadmissible, nor deny its inherent powers of persuasion. It does not forbid judging by the usual process by which the significance of conduct often will be determined by facts which are not acts. Actions of the accused are set in time and place in many relationships. Environment illuminates the meaning of acts as context does that of words. What a man is up to may be clear from considering his bare acts by themselves, often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, the give and take of the situation.

It would be no contribution to certainty of judgment, which is the object of the provision, to construe it to deprive a trial court of the aid of testimony under the ordinary sanctions of verity,

[42] There are, of course, rare cases where adherence might be proved by an overt act such as subscribing an oath of allegiance or accepting pay from an enemy. These might supplement proof of other acts of aid and comfort; but no such overt acts of adherence are involved in this case.

provided, of course, resort is not had to evidence of less than the constitutional standard to supply deficiencies in the constitutional measure of proof of overt acts. For it must be remembered that the constitutional provision establishes a minimum of proof of incriminating acts, without which there can be no conviction, but it is not otherwise a limitation on the evidence with which a jury may be persuaded that it ought to convict. The Constitution does not exclude or set up standards to test evidence which will show the relevant acts of persons other than the accused or their identity or enemy character or other surrounding circumstances. Nor does it preclude any proper evidence of non-incriminating facts about a defendant, such for example as his nationality, naturalization, and residence.

From duly proven overt acts of aid and comfort to the enemy in their setting, it may well be that the natural and reasonable inference of intention to betray will be warranted. The two-witness evidence of the acts accused, together with common-law evidence of acts of others and of facts which are not acts, will help to determine which among possible inferences as to the actor's knowledge, motivation, or intent are the true ones. But the protection of the two-witness rule extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given.

The controversy before us has been waged in terms of intentions, but this, we think, is the reflection of a more fundamental issue as to what is the real function of the overt act in convicting of treason. The prisoner's contention that it, alone and on its face must manifest a traitorous intention, apart from an intention to do the act itself, would place on the overt act the whole burden of establishing a complete treason. On the other hand, the Government's contention that it may prove by two witnesses an apparently commonplace and insignificant act and from other circumstances create an inference that the act was a step in treason and was done with treasonable intent really is a contention that the function of the overt act in a treason prosecution is almost zero. It is obvious that the function we ascribe to the overt act is significant chiefly because it measures the two-witness rule protection to the accused and its handicap to the prosecution. If the overt act or acts must go all the way to make out the complete treason, the defendant is protected at all points by

the two-witness requirement. If the act may be an insignificant one, then the constitutional safeguards are shrunken so as to be applicable only at a point where they are least needed.

The very minimum function that an overt act[43] must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave[44] aid and comfort to the enemy. Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses. The two-witness principle is to interdict imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness. The prosecution cannot rely on evidence which does not meet the constitutional test for overt acts to create any inference that the accused did other acts or did something more than was shown in the overt act, in order to make a giving of aid and comfort to the enemy. The words of the Constitution were chosen, not to make it hard to prove merely routine and everyday acts, but to make the proof of acts that convict of treason as sure as trial processes may. When the prosecution's case is thus established, the Constitution does not prevent presentation of corroborative or cumulative evidence of any admissible character either to strengthen a direct case or to rebut the testimony or inferences on behalf of defendant. The Government is not prevented from making a strong case; it is denied a conviction on a weak one.

It may be that in some cases the overt acts sufficient to prove giving of aid and comfort, will fall short of showing intent to betray and that questions will then be raised as to permissible methods of proof that we do not reach in this case. But in this and some cases we have cited where the sufficiency of the overt acts has been challenged because they were colorless as to intent, we are persuaded the reason intent was left in question was that the acts were really indecisive as a giving of aid and comfort. When we deal with acts that are trivial and commonplace and hence are doubtful as to whether they gave aid and comfort to the

[43] Of course, the Constitution does not require a treason to be proved by any single overt act. It may be grounded upon any number, each to be supported by the testimony of two witnesses. We speak in the singular but what we say applies as well to a series of acts or to the sum of many acts.

[44] We are not concerned here with any question as to whether there may be an offense of attempted treason.

enemy, we are most put to it to find in other evidence a treacherous intent.

We proceed to consider the application of these principles to Cramer's case.

IV.

The indictment charged Cramer with adhering to the enemies of the United States, giving them aid and comfort, and set forth ten overt acts. The prosecution withdrew seven, and three were submitted to the jury. The overt acts which present the principal issue[45] are alleged in the following language:

"1. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did meet with Werner Thiel and Edward John Kerling, enemies of the United States, at the Twin Oaks Inn at Lexington Avenue and 44th Street, in the City and State of New York, and did confer, treat, and counsel with said Werner Thiel and Edward John Kerling for a period of time for the purpose of giving and with intent to give aid and comfort to said enemies, Werner Thiel and Edward John Kerling.

"2. Anthony Cramer, the defendant herein, on or about June 23, 1942, at the Southern District of New York and within the jurisdiction of this Court, did accompany, confer, treat, and counsel with Werner Thiel, an enemy of the United States, for a period of time at the Twin Oaks Inn at Lexington Avenue and 44th Street, and at Thompson's Cafeteria on 42nd Street between Lexington and Vanderbilt Avenues, both in the City and State of New York, for the purpose of giving and with intent to give aid and comfort to said enemy, Werner Thiel."

[45] The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient. Stromberg *v.* California, 283 U. S. 359, 368; Williams *v.* North Carolina, 317 U. S. 287, 292. The tenth act charged, the third submitted, was based on five falsehoods told by Cramer after his arrest to agents of the Federal Bureau of Investigation, admittedly for the purpose of shielding Werner Thiel. After some time he recanted the falsehoods and told the truth. Thiel had already been taken into custody when the interviews occurred. The prisoner contends that lying to his jailer does not constitute treason, that in the whole history of treason no precedent can be or is cited for holding a false statement while under interrogation after imprisonment is treason, that in any event it amounted to no more than an attempt which was not consummated, that there was no right to interrogate Cramer under the circumstances, and that admissions made out of court are rendered inadmissible as proof of overt acts in view of the re-

At the present stage of the case we need not weigh their sufficiency as a matter of pleading. Whatever the averments might have permitted the Government to prove, we now consider their adequacy on the proof as made.

It appeared upon the trial that at all times involved in these acts Kerling and Thiel were under surveillance of the Federal Bureau of Investigation. By direct testimony of two or more agents it was established that Cramer met Thiel and Kerling on the occasions and at the places charged and that they drank together and engaged long and earnestly in conversation. This is the sum of the overt acts as established by the testimony of two witnesses. There is no two-witness proof of what they said nor in what language they conversed. There is no showing that Cramer gave them any information whatever of value to their mission or indeed that he had any to give. No effort at secrecy is shown, for they met in public places. Cramer furnished them no shelter, nothing that can be called sustenance or supplies, and there is no evidence that he gave them encouragement or counsel, or even paid for their drinks.

The Government recognizes the weakness of its proof of aid and comfort, but on this score it urges: "Little imagination is required to perceive the advantage such meeting would afford to enemy spies not yet detected. Even apart from the psychological comfort which the meetings furnished Thiel and Kerling by way of social intercourse with one who they were confident would not report them to the authorities, as a loyal citizen should, the meetings gave them a source of information and an avenue for contact. It enabled them to be seen in public with a citizen above suspicion and thereby to be mingling normally with the citizens of the country, with which they were at war." The difficulty with this argument is that the whole purpose of the constitutional provision is to make sure that treason conviction shall rest on direct proof of two witnesses and not on even a little imagination. And without the use of some imagination it is difficult to perceive any advantage which this meeting afforded to Thiel and Kerling or enemies or how it strengthen

quirement that the act be proved by two witnesses or by "confession in open court." The use of this evidence as an overt act of treason is complicated, and we intimate no views upon it in view of reversal on other grounds. Were we to affirm we should have first to resolve these questions against the prisoner.

Germany or weakened the United States in any way whatever. It may be true that the saboteurs were cultivating Cramer as a potential "source of information and an avenue for contact." But there is no proof either by two witnesses or by even one witness or by any circumstance that Cramer gave them information or established any "contact" for them with any person other than an attempt to bring about a rendezvous between Thiel and a girl, or that being "seen in public with a citizen above suspicion" was of any assistance to the enemy. Meeting with Cramer in public drinking places to tipple and trifle was no part of the saboteurs' mission and did not advance it. It may well have been a digression which jeopardized its success.

The shortcomings of the overt act submitted are emphasized by contrast with others which the indictment charged but which the prosecution withdrew for admitted insufficiency of proof. It appears that Cramer took from Thiel for safekeeping a money belt containing about $3,600, some $160 of which he held in his room concealed in books for Thiel's use as needed. An old indebtedness of Thiel to Cramer of $200 was paid from the fund, and the rest Cramer put in his safe-deposit box in a bank for safekeeping. All of this was at Thiel's request. That Thiel would be aided by having the security of a safe-deposit box for his funds, plus availability of smaller amounts, and by being relieved of the risks of carrying large sums on his person—without disclosing his presence or identity to a bank—seems obvious. The inference of intent from such act is also very different from the intent manifest by drinking and talking together. Taking what must have seemed a large sum of money for safekeeping is not a usual amenity of social intercourse. That such responsibilities are undertaken and such trust bestowed without the scratch of a pen to show it, implies some degree of mutuality and concert from which a jury could say that aid and comfort was given and was intended. If these acts had been submitted as overt acts of treason, and we were now required to decide whether they had been established as required, we would have a quite different case. We would then have to decide whether statements on the witness stand by the defendant are either "confession in open court" or may be counted as the testimony of one of the required two witnesses to make out otherwise insufficiently proved "overt acts." But this transaction was

not proven as the Government evidently hoped to do when the indictment was obtained. The overt acts based on it were expressly withdrawn from the jury, and Cramer has not been convicted of treason on account of such acts. We cannot sustain a conviction for the acts submitted on the theory that even if insufficient, some unsubmitted ones may be resorted to as proof of treason. Evidence of the money transaction serves only to show how much went out of the case when it was withdrawn.

The Government contends that outside of the overt acts, and by lesser degree of proof, it has shown a treasonable intent on Cramer's part in meeting and talking with Thiel and Kerling. But if it showed him disposed to betray, and showed that he had opportunity to do so, it still has not proved in the manner required that he did any acts submitted to the jury as a basis for conviction which had the effect of betraying by giving aid and comfort. To take the intent for the deed would carry us back to constructive treasons.

It is outside of the commonplace overt acts as proved that we must find all that convicts or convinces either that Cramer gave aid and comfort or that he had a traitorous intention. The prosecution relied chiefly upon the testimony of Norma Kopp, the fiancée of Thiel, as to incriminating statements made by Cramer to her,[46] upon admissions made by Cramer after his arrest to agents of the Federal Bureau of Investigation,[47] upon letters

[46] The testimony of Norma Kopp was probably the most damaging to the prisoner. She was a German alien who had been in the United States since 1928, but had never become a citizen. She had long and intimately known both Cramer and Thiel and became engaged to marry Thiel four days before he left for Germany. She knew him to be a Nazi. She received at Westport, Conn., where she was working as a laundry and kitchen maid, a note from Cramer, asking her to come to New York for an undisclosed reason. She came and Cramer then, she says, told her that Thiel was back, that he came with others, that six of them landed from a submarine in a rubber boat in Florida, that they brought much money "from Germany from the German Government," that Cramer was keeping it for Thiel in his safety deposit box, that these men got instructions from a "sitz" in the Bronx as to where to go, but Cramer said he did not know what he meant by "sitz." Cramer said he expected Thiel that evening at his apartment, but Thiel did not come. Cramer failed to bring about her meeting with Thiel, as he had promised her. She was at Kolping House when Cramer was taken into custody. The following day pictures of the saboteurs and the story of their landing and arrest was in the newspapers. She was taken into custody and questioned by the Federal Bureau of Investigation.

[47] Cramer left a note for "William Thomas," the name under which Thiel was going, at the Commodore Hotel, where he was staying, saying that Miss Kopp had come and asking Thiel to meet them at Thompson's Cafeteria at 4:00 that afternoon or call them at 7:00 that evening at Kolping House. Thiel had been arrested and did not keep the rendezvous nor make the call. About

and documents found on search of his room by permission after his arrest,[48] and upon testimony that Cramer had curtly refused to buy Government bonds.[49] After denial of defendant's motion to dismiss at the close of the prosecution's case, defendant became a witness in his own behalf and the Government obtained on

10:50 p. m., June 27, Cramer was taken into custody at Kolping House and taken to the Bureau's headquarters in New York. He told the agents that the man he had been with at Thompson's Cafeteria was William Thomas, that Thomas had worked in a factory on the West Coast since March of 1941 and had not been out of the United States. When asked if the true name of William Thomas was not Werner Thiel, he replied that it was and that Thiel was using an assumed name because of difficulties with his draft board. He stated that the money belt which Thiel had given him contained only $200, which Thiel owed him, and that the $3500 in the safety deposit box belonged to him and had been obtained from the sale of securities. The gravity of the offense with which he might be confronted was intimated to Cramer, and he asked if he might speak with agent Ostholthoff alone. To him he recanted his previous false statements and admitted that he knew Thiel had come from Germany, probably on a mission for the German Government, which he thought was "to stir up unrest among the people and probably spread propaganda." He repeated this in the presence of other agents and stated that he had lied in order to protect Thiel. Cramer authorized the agents to search his room and to open his safe deposit box at the Corn Exchange Bank and remove the contents thereof.

[48] As summarized in the opinion of the Circuit Court of Appeals, these are: "Writing Thiel in Germany, November 25, 1941, appellant said that defiance, boldness, will, and sharp weapons will decided [sic] the war, and the German Army and the German people are not lacking in these,' that he was 'very discontent' and sat here 'in pitiable comfort,' and that he had refused a job in Detroit at $100 per week because 'I do not want to soil my hands with war work.' To his family in Germany he wrote December 3, 1941, of 'the gigantic sacrifices which the glorious, disciplined German Army is making from day to day for the Homeland,' that 'every day here I hear the shrieks of hatred and the clamor for annihilation from the hostile foreigners,' and that a lost war 'means today a complete extirpation of the German nation.' To a friend in Chicago he wrote April 21, 1942, objecting to conscription 'after one has spent almost half a lifetime here in the States,' and saying 'personally I should not [illegible] at all to be misused by the American army as a world conqueror.' All the letters were written in German."

[49] On the Government's case a witness testified that he went to Cramer's apartment, told him that he was a representative of the United States Government on a pledge drive and asked him if he would like to sign a pledge for a bond. Cramer said he was not interested and, in reply to the question whether he would sign up for a stamp, he said he was not even interested in the purchase of a 10 cent stamp. He then closed the door. The witness rang again and Cramer opened the door again and then closed it.

Norma Kopp testified that Cramer told her that the "Minute Man" called at his door, "and he got kind of fresh and he closed the door at him." Miss Kopp's testimony was objected to and was offered as "showing the general motive and disposition, in so far as loyalty to the country is concerned, of this defendant," and as probative on the issue of intent. The court received it on the theory that incidents of that sort might corroborate or the jury might find it corroborated certain other testimony offered by the Government indicating a motive or intent.

cross-examination some admissions of which it had the benefit on submission.[50]

It is not relevant to our issue to appraise weight or credibility of the evidence apart from determining its constitutional sufficiency. Nor is it necessary in the view we take of the more fundamental issues, to discuss the reservations which all of us entertain as to the admissibility of some of it or those which some entertain as to other of it. We could conclude in favor of affirmance only if all questions of admissibility were resolved against the prisoner. At all events, much of the evidence is of the general character whose infirmities were feared by the framers and sought to be safeguarded against.

Most damaging is the testimony of Norma Kopp, a friend of Cramer's and one with whom, if she is to be believed, he had been most indiscreetly confidential. Her testimony went considerably beyond that of the agents of the Federal Bureau of Investigation as to admissions of guilty knowledge of Thiel's hostile mission and of Cramer's sympathy with it. To the extent that his conviction rests upon such evidence, and it does to an unknown but considerable extent, it rests upon the uncorroborated testimony of one witness not without strong emotional interest in the drama of which Cramer's trial was a part. Other evidence relates state-

[50] The defendant, having testified in his own behalf, was under cross-examination. He was asked: "Q. Now sir, isn't it the fact that you did write to Germany in the year 1941 several letters in which you discussed the United States in an unfriendly manner? A. I do not know unfriendly. I would say that I have criticized a few persons. I have never criticized the United States as such." He was then asked whether in 1941 he did not receive letters from his nephew Norbert and whether it was not the fact that Cramer's brother, Norbert's father, "through Norbert warned you that your letters discussed the United States in such an unfriendly fashion that Norbert's father feared that you would be put on the blacklist, because according to him the letters went through an American censorship?" Objection was duly made that the letters referred to were from someone else and could not bind the defendant. The objection was overruled, and the witness answered: "Well, I have received a letter from my nephew Norbert which mentions that. I admit that." A motion to strike the answer was denied, and exceptions to both rulings were duly taken.

The Circuit Court of Appeals observed that, "Of course, these expressions of opinion could not properly bind appellant; and the objection might wisely have been sustained." But it concluded that the ruling was not sufficiently prejudicial to call for reversal.

While defendant was under cross-examination, he was asked, "By the way, Mr. Witness, you have testified at length here about your various studies and your various occupations and interests. Were you ever interested in law? A. No, sir; I was not. Q. Isn't it a fact, sir, that at one time you were particularly interested in the law of treason? A. No, sir; I have never been interested in that." The District Attorney then offered a complete text of

ments by Cramer before the United States was at war with Germany. At the time they were uttered, however, they were not treasonable. To use pre-war expressions of opposition to entering a war to convict of treason during the war is a dangerous procedure at best. The same may be said about the inference of disloyal attitude created by showing that he refused to buy bonds and closed the door in the salesman's face. Another class of evidence consists of admissions to agents of the Federal Bureau of Investigation. They are of course, not "confessions in open court." The Government does not contend and could not well contend that admissions made out of court, if otherwise admissible, can supply a deficiency in proof of the overt act itself.

V.

The Government has urged that our initial interpretation of the treason clause should be less exacting, lest treason be too hard to prove and the Government disabled from adequately combating the techniques of modern warfare. But the treason offense is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security. In debating this provision, Rufus King observed to the Convention that the "controversy relating to treason might be of less magnitude than was sup-

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the Constitution of the United States as printed in the New York Times in 1937. It had been found in Cramer's room and on it were marks which he admitted making. One of the marks was opposite the paragraph which defines treason. The District Attorney offered it for impeachment and also contended it to be of probative force to show that this witness had in mind at the time those events which are the subject of the indictment here occurred what the law of treason was." Against objection the court admitted it as material and relevant and declined to limit the grounds on which it was received.

It appears without dispute that the marks on this copy of the Constitution were made at a time not definitely established but clearly before the United States entered the war and when the policy of the Government was declared to be one of neutrality.

The treason paragraph of the Constitution was one of six provisions which he marked. Another was the provision of Article 1 of Section 7, that if any bill passed by the Congress shall not be returned by the President within ten days after have been presented to him, the same shall be a law. Another, the provision of Article 1, Section 8, that Congress shall have the power to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water. A third was Article 1, Section 9, which provides that no bill of attainder or ex post facto law shall be passed. A fourth was that provision of Article 1, Section 9, that no title of nobility shall be granted by the United States. Another was the portion of Article 2, Section 1, which sets forth the President's oath.

The petitioner was naturalized in 1926, and so far as appears, came into possession of the Constitution in 1937.

posed as the legislature might punish capitally under other names than Treason."[51] His statement holds good today. Of course we do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name. But the power of Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety. The loyal and the disloyal alike may be forbidden to do acts which place our security in peril, and the trial thereof may be focussed upon defendant's specific intent to do those particular acts[52] thus eliminating the accusation of treachery and of general intent to betray which have such passion-rousing potentialities. Congress repeatedly has enacted prohibitions of specific acts thought to endanger our security[53] and the practice of foreign nations with defense problems more acute than our own affords examples of others.[54]

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[51] 2 Farrand 347.

[52] E. g., Hartzel v. United States, 322 U. S. 680.

[53] Congress has prohibited obtaining defense information in certain ways, 50 U. S. C. § 31; certain disclosures of information, 50 U. S. C. § 32; certain seditious and disloyal acts in war time, 50 U. S. C. § 33; and has enacted such statutes as the Trading with the Enemy Act, 50 U. S. C. c. 3A.

[54] The Government's Appendix includes such examples as the following:

Danish Penal Code.—"Sec. 105. One who commits an act by virtue of which a foreign service of military intelligence is set up, or who assists directly or indirectly in its functioning on the territory of the State of Denmark, shall be punished by imprisonment up to two years and in cases of extenuating circumstances by detention."

Polish Code.—"Art. 100, Sec. 1. Whoever in time of war acts in favor of the enemy or to the damage of the Polish armed forces or allied forces shall be punished by imprisonment not under ten years or for life.

"Art. 100, Sec. 2. If the offender unintentionally acted, he shall be punished by imprisonment not to exceed three years or by detention not to exceed three years."

French Code of 1939.—"Art. 103. Whoever, knowing about the plans of an act of treason or espionage, does not report them to the military, administrative, or judicial authorities as soon as he acquired knowledge shall be punished by penalties provided by Art. 83 for the attack on the exterior safety of the State."

The French Code (Harboring) provides in Article 85 that every Frenchman and every foreigner shall be punished as an accomplice or for harboring:

"(1) Who, knowing the intentions of the perpetrators of major crimes and minor crimes against the exterior safety of the State, furnishes them subsidies, means of existence, lodging, place of asylum or meeting place.

"(2) Who, knowingly carries the correspondence of the perpetrators of a major or minor crime or knowingly facilitates them in any manner whatsoever in finding, harboring, transporting, or transmitting, the objects of a major or minor crime.

"(3) Who harbors knowingly the objects or instruments which served or should serve for the commission of the crime or offense or material objects or documents obtained through a crime or offense."

The framers' effort to compress into two sentences the law of one of the most intricate of crimes gives a superficial appearance of clarity and simplicity which proves illusory when it is put to practical application. There are few subjects on which the temptation to utter abstract interpretative generalizations is greater or on which they are more to be distrusted. The little clause is packed with controversy and difficulty. The offense is one of subtlety, and it is easy to demonstrate lack of logic in almost any interpretation by hypothetical cases, to which real treasons rarely will conform. The protection of the two-witness requirement, limited as it is to overt acts, may be wholly unrelated to the real controversial factors in a case. We would be understood as speaking only in the light of the facts and of the issues raised in the case under consideration, although that leaves many undetermined grounds of dispute which, after the method of the common law, we may defer until they are presented by facts which may throw greater light on their significance. Although nothing in the conduct of Cramer's trial evokes it, a repetition of Chief Justice Marshall's warning can never be untimely:

"As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made, a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both." . . . "It is therefore more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide." *Ex parte Bollman*, 4 Cranch 75, 125, 127.

It is not difficult to find grounds upon which to quarrel with this Constitutional provision. Perhaps the framers placed rather more reliance on direct testimony than modern researches in psychology warrant. Or it may be considered that such a quantitative measure of proof, such a mechanical calibration of evidence is a crude device at best or that its protection of innocence is too fortuitous to warrant so unselective an obstacle to conviction. Certainly the treason-rule, whether wisely or not, is severely restrictive. It must be remembered, however, that the Constitutional Convention was warned by James Wilson that "Treason may sometimes be practiced in such a manner, as to render proof extremely difficult

as in a traitorous correspondence with an Enemy."[55] The provision was adopted not merely in spite of the difficulties it put in the way of prosecution but because of them. And it was not by whim or by accident, but because one of the most venerated of that venerated group considered that "prosecutions for treason were generally virulent." Time has not made the accusation of treachery less poisonous, nor the task of judging one charged with betraying the country, including his triers, less susceptible to the influence of suspicion and rancor. The innovations made by the forefathers in the law of treason were conceived in a faith such as Paine put in the maxim that "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself."[56] We still put trust in it.

We hold that overt acts 1 and 2 are insufficient as proved to support the judgment of conviction, which accordingly is

Reversed.

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[55] 2 Farrand 348.

[56] See Brooks, The World of Washington Irving, 73 n.

SUPREME COURT OF THE UNITED STATES.

No. 13.—October Term, 1944.

Anthony Cramer, Petitioner,
vs.
The United States of America.
On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 23, 1945.]

Mr. Justice Douglas, with whom the Chief Justice, Mr. Justice Black and Mr. Justice Reed concur, dissenting.

The opinion of the Court is written on a hypothetical state of facts, not on the facts presented by the record. It states a rule of law based on an interpretation of the Constitution which is not only untenable but is also unnecessary for the decision. It disregards facts essential to a determination of the question presented for decision. It overlooks the basic issue on which our disposition of the case must turn. In order to reach that issue we must have a more exact appreciation of the facts than can be gleaned from the opinion of the Court.

I.

Cramer is a naturalized citizen of the United States, born in Germany. He served in the German army in the last war, coming to this country in 1925. In 1929 he met Thiel who had come to this country in 1927 from a place in Germany not far from petitioner's birthplace. The two became close friends; they were intimate associates during a twelve-year period. In 1933 Cramer found work in Indiana. Thiel joined him there. Both became members of the Friends of New Germany, predecessor of the German-American Bund. Cramer was an officer of the Indiana local. He resigned in 1935 but Thiel remained a member and was known as a zealous Nazi. In 1936 Cramer visited Germany. On his return he received his final citizenship papers. He and Thiel returned to New York in 1937 and lived either together or in close proximity for about four years. Thiel left for Germany in the spring of 1941, feeling that war between the United States and Germany was imminent. According to Cramer, Thiel was

"up to his ears" in Nazi ideology. Cramer corresponded with Thiel in Germany. Prior to our declaration of war, he was sympathetic with the German cause and critical of our attitude. Thus in November, 1941, he wrote Thiel saying he had declined a job in Detroit "as I don't want to dirty my fingers with war material"; that "We sit here in pitiable comfort, when we should be in the battle—as Nietzsche says—I want the man, I want the woman, the one fit for war, the other fit for bearing." In the spring of 1942 he wrote another friend in reference to the possibility of being drafted: "Personally, I should not care at all to be misused by the American army as a world conqueror." Cramer listened to short-wave broadcasts of Lord Haw-Haw and other German propagandists. He knew that the theme of German propaganda was that England and the United States were fighting a war of aggression and seeking to conquer the world.

So much for the background. What followed is a sequel to *Ex parte Quirin*, 317 U. S. 1.

Thiel entered the German army and in 1942 volunteered with seven other German soldiers who had lived in the United States for a special mission to destroy the American aluminum industry. They were brought here by German submarines in two groups. Kerling was the leader and Thiel a member of one group which landed by rubber boat near Jacksonville, Florida, on June 17, 1942. They buried their explosives and proceeded to New York City, where on June 21st they registered at the Hotel Commodore under the assumed names of Edward Kelly and William Thomas.

The next morning a strange voice called Cramer's name from the hall of the rooming house where he lived. On his failure to reply an unsigned note was slipped under his door. It read, "Be at the Grand Central station tonight at 8 o'clock, the upper platform near the information booth. Franz from Chicago has come into town and wants to see you; don't fail to be there." Cramer said he knew no Franz from Chicago. But nevertheless he was on hand at the appointed hour and place. Thiel shortly appeared. They went to the Twin Oaks Inn where they talked for two hours. Cramer admitted that he knew Thiel had come from Germany; and of course, he knew that at that time men were not freely entering this country from Germany. He asked Thiel, "Say, how have you come over, have you come by submarine?" Thiel looked startled, smiled, and said, "Some other time I am going to tell

you all about this." Thiel told him that he had taken the assumed name of William Thomas and had a forged draft card. Thiel admonished him to remember that he, Thiel, was "anti-Nazi"—a statement Cramer doubted because he knew Thiel was a member of the Nazi party. Thiel indicated he had come from the coast of Florida. Cramer inquired if he had used a rubber boat. When Thiel said that the only time he was "scared to death was when I came over here we got bombed," Cramer replied, "Then you have come over by submarine, haven't you?" Thiel told Cramer that he had "three and a half or four thousand dollars" with him and that "if you have the right kind of connection you can even get dollars in Germany." Cramer offered to keep Thiel's money for him. Thiel agreed but nothing was done about it that evening. Cramer admitted he had a "hunch" that Thiel was here on a mission for the German government. He asked Thiel "whether he had come over here to spread rumors and incite unrest." Cramer after his arrest told agents of the F. B. I. that he had suspected that Thiel had received the money from the German government, that Thiel in fact had told him that he was on a mission for Germany, and that "whatever his mission was, I thought that he was serious in his undertaking." Thiel from the beginning clothed his actions with secrecy; was unwilling to be seen at Cramer's room ("because I have too many acquaintances there and I don't want them to see me"); and cautioned Cramer against conversing loudly with him in the public tavern.

So they agreed to meet at the Twin Oaks Inn at 8 P. M. on the following evening, June 23, 1942. At this meeting Kerling joined them. Cramer had met Kerling in this country and knew he had returned to Germany. Kerling and Thiel told Cramer that they had come over together. Cramer had a "hunch" that Kerling was here for the same purpose as Thiel. Kerling left Thiel and Cramer after about an hour and a half. Kerling was followed and arrested. Cramer and Thiel stayed on at the tavern for about another hour. After Kerling left, Thiel agreed to entrust his money to Cramer for safekeeping. He told Cramer to take out $200 which Thiel owed him. But he asked Cramer not to put all of the balance in the safe deposit box—that he should keep some of it out "in the event I need it in a hurry." Thiel went to the washroom to

remove the money belt. He handed it to Cramer on the street when they left the tavern. From the Twin Oaks Thiel and Cramer went to Thompson's Cafeteria where they conversed for about fifteen minutes. They agreed to meet there at 8 P. M. on June 25th. They parted. Thiel was followed and arrested.

Cramer returned home. He put Thiel's money belt in a shoe box. He put some of the money between the pages of a book. Later he put the balance in his bank, some in a savings account, most of it in his safe deposit box. He and Thiel had talked of Thiel's fiancé, Norma Kopp. At the first meeting Cramer had offered to write her on Thiel's behalf. He did so. He did not mention Thiel's name but asked her to come to his room, saying he had "sensational" news for her. Cramer appeared at Thompson's Cafeteria at 8 P. M. June 25th to keep his appointment with Thiel. He waited about an hour and a half. He returned the next night, June 26th, and definitely suspected Thiel had been arrested. Though he knew Thiel was registered at the Hotel Commodore, he made no attempt to get in touch with him there. When he returned to his room that night, Norma Kopp was waiting for him. She testified that he told her that Thiel was here; that "they came about six men with a U-boat," in a rubber boat, and landed in Florida"; that they "brought so much money along from Germany from the German government" he was keeping it in a safe deposit box; and that they "get instructions from the sitz (hideout) in the Bronx what to do, and where to go". The next morning Cramer left a note for "William Thomas" at the Commodore saying that Norma Kopp had arrived and suggested a rendezvous. Later in the day Cramer was arrested. He told the agents of the F. B. I. that the name of the man who had been with him at Thompson's Cafeteria on the evening of June 23rd was "William Thomas"; that "Thomas" had been working in a factory on the West Coast since March, 1941, and had not been out of the United States since then. He was asked if "Thomas" was not Thiel. He then admitted he was, saying that Thiel had used an assumed name, as he was having difficulties with his draft board. He also stated that the money belt Thiel gave him contained only $200 which Thiel owed him and that the $3500 in his safe deposit box belonged to him and were the proceeds from the sale of securities. After about an hour or so of the falsehoods Cramer asked to speak to one of the

agents alone. The request was granted. He then recanted his previous false statements and stated that he felt sure that Thiel had come from Germany by submarine on a mission for the German Government and that he thought that mission was "to stir up unrest among the people and probably spread propaganda." He stated he had lied in order to protect Thiel.

The Court holds that this evidence is insufficient to sustain the conviction of Cramer under the requirements of the Constitution. We disagree.

II.

Article III, Sec. 3 of the Constitution defines treason as follows: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

The charge against Cramer was that of adhering. The essential elements of the crime are that Cramer (1) with treasonable intent (2) gave aid and comfort to the enemy.[1]

There was ample evidence for the jury that Cramer had a treasonable intent. The trial court charged the jury that "criminal intent and knowledge, being a mental state, are not susceptible of being proved by direct evidence, and therefore you must infer the nature of the defendant's intent and knowledge from all the circumstances." It charged that proof of criminal intent and knowledge is sufficient if proved beyond a reasonable doubt, and that the two witnesses are not necessary for any of the facts other than the overt acts. On that there apparently is no disagreement. It also charged: "Now gentlemen, motive should not be confused

[1] It is well established that the overt act and the intent are separate and distinct elements of the crime of treason under the Constitution. See Ex parte Bollman, 4 Cranch. 75, 126; United States v. Burr, 25 Fed. Cas. 2, 13-14, No. 14,692a; United States v. Lee, 26 Fed. Cas. 907, No. 15,584; United States v. Vigol, 28 Fed. Cas. 376, No. 16,621; United States v. Hanway, 26 Fed. Cas. 105,126, No. 15,299; United States v. Greiner, 26 Fed. Cas. 36, 39, No. 15,262; United States v. Greathouse, 26 Fed. Cas. 18, 22, No. 15,254; United States v. Werner, 247 Fed. 708, 709-710; United States v. Fricke, 259 Fed. 673, 677; United States v. Robinson, 259 Fed. 685, 690; United States v. Stephan, 50 F. Supp. 738, 742-743, aff'd 133 F. 2d 87, 99. Chief Justice Marshall ruled in United States v. Burr, 25 Fed. Cas. 52, 54, No. 14,692b, that it was in the discretion of the prosecutor to present evidence of the intent before proof of an overt act. And see United States v. Lee, *supra*.

with intent. If the defendant knowingly gives aid and comfort to one who he knows or believes is an enemy, then he must be taken to intend the consequences of his own voluntary act, and the fact that his motive might not have been to aid the enemy is no defense. In other words, one cannot do an act which he knows will give aid and comfort to a person he knows to be an enemy of the United States, and then seek to disclaim criminal intent and knowledge by saying that one's motive was not to aid the enemy. So if you believe that the defendant performed acts which by their nature gave aid and comfort to the enemy, knowing or believing him to be an enemy, then you must find that he had criminal intent, since he intended to do the act forbidden by the law. The fact that you may believe that his motive in so doing was, for example, merely to help a friend, or possibly for financial gain, would not change the fact that he had a criminal intent." On that there apparently is no disagreement. A man who voluntarily assists one known or believed to be an enemy agent may not defend on the ground that he betrayed his country for only thirty pieces of silver. See *Haupt* v. *Doane*, 12 Wall. 342, 347; *Sprott* v. *United States*, 20 Wall. 459, 463. "The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act." *Haupt* v. *Doane*, *supra*. For the same reasons a man cannot slip through our treason law because his aid to those who would destroy his country was prompted by a desire to "accommodate a friend." Loyalty to country cannot be subordinated to the amenities of personal friendship.

Cramer had a traitorous intent if he knew or believed that Thiel and Kerling were enemies and were working here in the interests of the German Reich. The trial court charged that mere suspicion was not enough, but that it was not necessary for Cramer to have known all their plans. There apparently is no disagreement on that. By that test the evidence against Cramer was overwhelming.

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2 Carlisle v. United States, 16 Wall. 147, 150-151; Sprott v. United States, 20 Wall. 459, 463-464; United States v. Hodges, 26 Fed. Cas. 332, 334, No. 15,374; Charge to Grand Jury—Treason, 30 Fed. Cas. 1032, 1034, No. 18,270; see also 1 East, Pleas of the Crown (1806) pp. 77-81; Warren, What is Giving Aid and Comfort to the Enemy (1918), 27 Yale L. J. 331, 343-345; Hazard and Stern, "Exterior Treason" (1938), 6 Chicago L. Rev. 77, 84-85. But a mere showing of aid and assistance to an alien enemy permanently residing in the United States without any showing that the enemy alien has designs against the interests of the United States, does not, without more, establish an act of treason. See United States v. Fricke, 259 Fed. 673, 682.

The conclusion is irresistible that Cramer believed, if he did not actually know, that Thiel and Kerling were here on a secret mission for the German Reich with the object of injuring the United States and that the money which Thiel gave him for safekeeping had been supplied by Germany to facilitate the project of the enemy. The trial court charged that if the jury found that Cramer had no purpose or intention of assisting the German Reich in its prosecution of the war or in hampering the United States in its prosecution of the war but acted solely for the purpose of assisting Kerling and Thiel as individuals, Cramer should be acquitted. There was ample evidence for the jury's conclusion that the assistance Cramer rendered was assistance to the German Reich, not merely assistance to Kerling and Thiel as individuals.

The trial judge stated when he sentenced Cramer that it did not appear that Cramer knew that Thiel and Kerling were in possession of explosives or other means for destroying factories in this country or that they planned to do that. He stated that if there had been direct proof of such knowledge he would have sentenced Cramer to death rather than to forty-five years in prison. But however relevant such particular knowledge may have been to fixing the punishment for Cramer's acts of treason, it surely was not essential to proof of his traitorous intent. A defendant who has aided an enemy agent in this country may not escape conviction for treason on the ground that he was not aware of the enemy's precise objectives. Knowing or believing that the agent was here on a mission on behalf of a hostile government, he could not, by simple failure to ask too many questions, assume that this mission was one of charity and benevolence toward the United States. But the present case is much stronger. For Cramer claims he believed the enemy agent's objective was to destroy national morale by propaganda and not to blow up war factories. Propaganda designed to cause disunity among adversaries is one of the chief weapons known to warfare, and upon occasion one of the most effective. No one can read this record without concluding that the defendant Cramer knew this. He is an intelligent, if misguided, man. He has a quick wit sharpened by considerable learning of its kind. He is widely read and a student of history and philosophy, particularly Ranke and Nietzsche. He had been an officer of a pro-German organization, and his closest associate

had been a zealous Nazi. He also had listened to German propagandists over the short wave. But, in any event, it is immaterial whether Cramer was acquainted with the efficacy of propaganda in modern warfare. Undoubtedly he knew that the German Government thought it efficacious. When he was shown consciously and voluntarily to have assisted this enemy program his traitorous intent was then and there sufficiently proved.

The Court does not purport to set aside the conviction for lack of sufficient evidence of traitorous intent. It frees Cramer from this treason charge solely on the ground that the overt acts charged are insufficient under the constitutional requirement.

III

The overt acts alleged were (1) that Cramer met with Thiel and Kerling on June 23rd, 1942, at the Twin Oaks Inn and "did confer, treat, and counsel" with them "for the purpose of giving and with the intent to give aid and comfort" to the enemy; (2) that Cramer "did accompany, confer, treat, and counsel with" Thiel at the Twin Oaks Inn and at Thompson's Cafeteria on June 23rd, 1942, "for the purpose of giving and with intent to give aid and comfort" to the enemy; and (3) that Cramer gave false information of the character which has been enumerated to agents of the F. B. I. "for the purpose of concealing the identity and mission" of Thiel and "for the purpose of giving and with intent to give aid and comfort" to the enemy.

The Court concedes that an overt act need not manifest on its face a traitorous intention. By that concession it rejects the defense based on the treason clause which Cramer has made here. The Court says an overt act must "show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy." It says, however, that the "protection of the two-witness rule extends at least to all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given." It adds, "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses. The two-witness principle is to interdict imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness. The prosecution cannot rely on evidence which does not meet the constitutional test for overt acts to create any

inference that the accused did other acts or did something more than was shown in the overt act, in order to make a giving of aid and comfort to the enemy." And when it comes to the overt acts of meeting and conferring with Thiel and Kerling the Court holds that they are inadequate since there was "no two-witness proof of what they said nor in what language they conversed." That is to say, reversible error is found because the two witnesses who testified to the fact that Cramer met twice with the saboteurs did not testify that Cramer gave them information of "value to their mission," such as, shelter, sustenance, supplies, encouragement or counsel.

That conclusion, we submit, leads to ludicrous results. The present case is an excellent example.

It is conceded that if the two witnesses had testified not only that they saw Cramer conferring with Thiel and Kerling but also heard him agree to keep Thiel's money and saw him take it, the result would be different. But the assumption is that since the two witnesses could not testify as to what happened at the meetings, we must appraise the meetings in isolation from the other facts of the record. Therein lies the fallacy of the argument.

In the first place, we fully agree that under the constitutional provision there can be no conviction of treason without proof of two witnesses of an overt act of treason. We also agree that the act so proved need not itself manifest on its face the treasonable intent. And as the Court states, such intent need not be proved by two witnesses. It may even be established by circumstantial evidence. For it is well established that the overt act and the intent are separate and distinct elements of the crime.[2] The "intent may be proved by one witness, collected from circumstances, or even by a single fact." *Case of Fries*, 9 Fed. Cas. 826, 909, No. 5126; *Respublica* v. *Roberts*, 1 Dallas 39; *United States* v. *Lee*, 26 Fed. Cas. 907, No. 15,584; *Trial of Dodd Mackin*, 26 How. St. Tr. 721, 795-798. Acts innocent on their face, when judged in the light of their purpose and of related events, may turn out to be acts of aid and comfort committed with treasonable purpose. It is the overt act charged as such in the indictment which must be proved by two witnesses and not the related events which make manifest its treasonable quality and purpose. This, we think, is the correct and necessary conclusion to be drawn from the concession that the overt act need not on its face mani-

[2] See note 1, *supra*.

fest the guilty purpose. The grossest and most dangerous act of treason may be, as in this case, and often is, innocent on its face. But the ruling of the Court that the related acts and events which show the true character of the overt act charged must be proved by two witnesses is without warrant under the constitutional provisions, and is so remote from the practical realities of proving the offence, as to render the constitutional command unworkable. The treasonable intent or purpose which it is said may be proved by a single witness or circumstantial evidence must, in the absence of a confession of guilt in open court, be inferred from all the facts and circumstances which surround and relate to the overt act. Inference of the treasonable purpose from events and acts related to or surrounding the overt act necessarily includes the inference that the accused committed the overt act with the knowledge or understanding of its treasonable character. To say that the treasonable purpose with which the accused committed the overt act may be inferred from related events proved by a single witness, and at the same time to say that so far as they show the treasonable character of the overt act, they must be proved by two witnesses, is a contradiction in terms. The practical effect of such a doctrine is to require proof by two witnesses, not only of the overt act charged which the Constitution requires but of every other fact and circumstance relied upon to show the treasonable character of the overt act and the treasonable purpose with which it was committed which the Constitution plainly does not require. Here, as in practically all cases where there is no confession in open court, the two are inseparable, save only in the single instance where the overt act manifests its treasonable character on its face. The court thus in substance adopts the contention of the respondent, which is not rejected in words, and for all practical purposes requires proof by two witnesses, not only of the overt act but of all other elements of the crime save only in the case where the accused confesses in open court. It thus exposes proof of the overt act with proof of the purpose or intent with which the overt act was committed and, without historical support, expands the constitutional requirement so as to include an element of proof not embraced by its words.

We have developed in the Appendix to this opinion the historic function of the overt act in treason cases. It is plain from those materials that the requirement of an overt act is designed to preclude punishment for treasonable plans or schemes or hopes which

have never moved out of the realm of thought or speech. It is made a necessary ingredient of the crime to foreclose prosecutions for constructive treason. The treasonable project is complete as a crime only when the traitorous intent has ripened into a physical and observable act. The act standing alone may appear to be innocent or indifferent, such as joining a person at a table, stepping into a boat, or carrying a parcel of food. That alone is insufficient. It must be established beyond a reasonable doubt that the act was part of the treasonable project and done in furtherance of it. Its character and significance are to be judged by its place in the effectuation of the project. That does not mean that where the treasonable scheme involves several treasonable acts, and the overt act which is charged has been proved by two witnesses, that all the other acts which tend to show the treasonable character of the overt act and the treasonable purpose with which it was committed must be proved by two witnesses. The Constitution does not so declare. There is no historical support for saying that the phrase "two witnesses to the same overt act" may be or can be read as meaning two witnesses to all the acts involved in the treasonable scheme of the accused. Obviously one overt act proved by two witnesses is enough to sustain a conviction even though the accused has committed many other acts which can be proved by only one witness or by his own admission in open court. Hence, it is enough that the overt act which is charged be proved by two witnesses. As the Court concedes, its treasonable character need not be manifest upon its face. We say that its true character may be proved by any competent evidence sufficient to sustain the verdict of a jury. Any other conclusion leads to such absurd results as to preclude the supposition that the two witness rule was intended to have the meaning attributed to it.

When we apply that test to the facts of this case it is clear to us that the judgment of conviction against Cramer should not be set aside. The historical materials which we have set forth in the Appendix to this opinion establish that a meeting with the enemy may be adequate as an overt act of treason. Hale, Kelyng and Foster establish that beyond peradventure of doubt. Such a meeting might be innocent on its face. It might also be innocent in its setting, as Hale, Kelyng and Foster point out, where, for example, it was accidental. We would have such a case here if Cramer's first meeting with Thiel was charged as an overt act.

For, as we have seen, Cramer went to the meeting without knowledge that he would meet, and confer with Thiel. But the subsequent meetings were arranged between them. They were arranged in furtherance of Thiel's designs. Cramer was not only on notice that Thiel was here on a mission inimical to the interests of this nation. He had agreed at the first meeting to hide Thiel's money. He had agreed to contact Norma Kopp. He knew that Thiel wanted his identity and presence in New York concealed. This was the setting in which the later meetings were held. The meetings take on their true character and significance from that setting. They constitute acts. They demonstrate that Cramer had a liking for Thiel's design to the extent of aiding him in it. They show beyond doubt that Cramer had more than a treasonable intent; that that intent had moved from the realm of thought into the realm of action. Since two witnesses proved that the meetings took place, their character and significance might be proved by any competent evidence.

In the second place, this judgment of conviction should be sustained even though we assume, *arguendo*, that Cramer's motion to dismiss at the end of the government's case should have been granted. The concern of the Court is that acts innocent on their face may be transformed into sinister or guilty acts by circumstantial evidence by inference, by speculation. The rule announced by the Court is based on a desire for trustworthy evidence in determining the character and significance of the overt acts. But this is not a case where an act innocent on its face is given a sinister aspect and made a part of a treasonous design by circumstantial evidence, by inference, or by the testimony of a single witness for the prosecution. We know from Cramer's own testimony—from his admissions at the trial—exactly what happened.

We know the character of the meetings from Cramer's own admissions. We know from his own lips that they were not accidental or casual conferences, or innocent, social meetings. He arranged them with Thiel. When he did so he believed that Thiel was here on a secret mission for the German Reich with the object of injuring this nation. He also knew that Thiel was looking for a place to hide his money. Cramer had offered to keep it for Thiel and Thiel had accepted the offer. Cramer had also offered to write Norma Kopp, Thiel's fiancé, without mentioning Thiel's name. Cramer also knew that Thiel wanted his identity and his presence in New York concealed. Cramer's admissions at the trial gave

character and significanse to those meetings. Those adinissions plus the finding of treasonable intent place beyond a reasonable doubt the conclusion that those meetings were steps in and part and parcel of the treasonable project.

Nor need we guess or speculate for knowledge of what happened at the meetings. We need not rely on circumstantial evidence, draw inferences from other facts, or resort to secondary sources. Again we know from Cramer's testimony at the trial—from his own admissions—precisely what transpired.

Cramer told the whole story in open court. He admitted he agreed to act and did act as custodian of the saboteur. Thiel's money. He agreed to hold it available for Thiel's use whenever Thiel might need it. It is difficult to imagine what greater aid one could give a saboteur unless he participated in the sabotage himself. Funds were as essential to Thiel's plans as the explosives he buried in the sands of Florida. Without funds the mission of all the saboteurs would have soon ended or been seriously crippled. Cramer did not stop here. Preservation of secrecy was essential to this invasion of the enemy. It was vital if the project was to be successful. In this respect Cramer also assisted Thiel. He cooperated with Thiel in the concealment of Thiel's identity and presence in New York City. He did his best to throw federal officers off the trail and to mislead them. He made false statements to them, saying that Thiel's true name was "Thomas" and that Thiel had not been out of the country since the war began. If Cramer had not testified, we would then be confronted with the questions discussed in the opinion of the Court. But he took the stand and told the whole story. It is true that at the end of the government's case Cramer moved to dismiss on the ground that the crime charged had not been made out. That motion was denied and an exception taken. If Cramer had rested there, the case submitted to the jury and a judgment of conviction rendered, we would have before us the problem presented in the opinion of the Court. But Cramer did not rest on that motion. He took the stand and told the whole story. Any defect in the proof was cured by that procedure. As stated in *Brock* v. *Cassel*, 149 F. 8, 17, 23, "A defendant has an undoubted right to stand upon his motion for a nonsuit, and have his writ of error if it be refused; but he has no right to insist upon his exception, after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made

by the testimony. It not infrequently happens that the defendant himself, by his own evidence, supplies the missing link". And see *Sugofus* v. *Porter*, 179 U. S. 116, 121; *McCabe & Stein Co.* v. *Wilson*, 209 U. S. 275, 276; *Bates* v. *Miller*, 133 F. 2d 645, 647-648; 9 Wigmore on Evidence (3d ed. 1940) § 2496. And the rule obtains in criminal as well as in civil cases. *Sheridan* v. *United States*, 112 F. 2d 503, 504, rev'd on other grounds 312 U. S. 654; *Edwards* v. *United States*, 7 F. 2d 357, 359; *Balducin* v. *United States*, 72 F. 2d 809, 812.

Why then must we disregard Cramer's admissions at the trial? Why must we assume, as does this Court, that those admissions are out of the case and that our decision must depend solely on the evidence presented by the government?

The Constitution says that a "confession in open court" is sufficient to sustain a conviction of treason. It was held in *United States* v. *Magtibay*, 2 Philippine Rep. 703, that a confession in open court to the overt acts charged in the indictment was not an adequate substitute for the testimony of two witnesses where the accused denied treasonable purpose. We need not go so far as to say that if the whole crime may be proved by an admission by the accused in open court, one of the ingredients of the offense may be established in like manner. *See Respublica* v. *Roberts*, *supra*. We do not say that if the government completely fails to prove an overt act or proves it by one witness only, the defect can be cured by the testimony of other witnesses or by the admissions of the accused. We do say that a meeting with the enemy is an act and may in its setting be an overt act of treason. We agree that overt acts innocent on their face should not be lightly transformed into incriminating acts. But so long as overt acts of treason need not manifest treason on their face, as the Court concedes, the sufficiency of the evidence to establish the treasonable character of the act, like the evidence of treasonable intent, depends on the quality of that evidence whatever the number of witnesses who supplied it. There can be no doubt in this case on that score. Certainly a person who takes the stand in defense of a treason charge against him will not be presumed to commit perjury when he makes admissions against self-interest. Admissions against self-interest have indeed always been considered as the highest character of evidence. When two witnesses testify to the overt acts, why then are not admissions of the accused in open court adequate to establish their true character? Could the testimony of

any number of witnesses more certainly or conclusively establish the significance of what was done? Take the case where two witnesses testify that the accused delivered a package to the enemy, the accused admitting in open court that the package contained guns or ammunition. Or two witnesses testify that the accused sent the enemy a message, innocuous on its face, the accused admitting in open court that the message was a code containing military information. Must a conviction be set aside because the two witnesses did not testify to what the accused admitted in open court? We say no. In such circumstances we have no examples of constructive treason. The intent is not taken for the deed. Proof of the overt act plus proof of a treasonable intent make clear that the treasonable design has moved out of the realm of thought into the field of action. And any possibility that an act innocent on its face has been transformed into a sinister or guilty act is foreclosed. For the significance and character of the act are supplied by the admissions from the lips of the accused in open court. The contrary result could be reached only if it were necessary that the overt act manifest treason on its face. That theory is rejected by the Court. But once rejected it is fatal to the defense.

Cramer's counsel could not defend on the grounds advanced by the Court for the simple reason that the government having proved by two witnesses that Cramer met and conferred with the saboteurs any possible insufficiency in the evidence which it adduced to show the character and significance of the meetings was cured by Cramer's own testimony. Cramer can defend only on the ground that the overt act must manifest treason, which the Court rejects, or on the ground that he had no treasonable intent which the jury found against him on an abundance of evidence. Those are the only alternatives because concededly conferences with saboteurs here on a mission for the enemy may be wholly adequate as overt acts under the treason clause. They were proved by two witnesses as required by the Constitution. Any possible doubt as to their character and significance as parts of a treasonable project were removed by the defendant's own admissions in open court. To say that we are precluded from considering those admissions in weighing the sufficiency of the evidence of the true character and significance of the overt acts is neither good sense nor good law. Such a result makes the way easy for the traitor, does violence to the Constitution and makes justice truly blind.

APPENDIX

The most relevant source of materials for interpretation of the treason clause of the Constitution is the statute of 25 Edw. III, Stat. 5, ch. 2 (1351) and the construction which was given it. It was with that body of law and the English and colonial experience under it that the Framers were acquainted. That statute specified seven offenses as constituting treason. As respects the three offenses relevant to our present discussion, it provided as follows: if a man "doth compass or imagine the death" of the king, or "if a man do levy war" against the king in his realm, or if he "be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be probably attainted of open deed", he shall be guilty of treason.

Coke makes clear that the requirement of an overt act under the statute applies to all of the offenses included in the category of treason. See Coke, Institutes of the Laws of England, Third Part (5th ed. London, 1671), p. 5. There are indications by Coke that the overt act was a separate element of the offense and that its function was to show that the treasonable design had moved from thought to action. *Id.*, pp. 5, 12, 14, 38. Hale is somewhat more explicit. In discussing the offense of compassing the king's death he indicates that the overt act may be "indifferent" in character. He says, "That words may expound an overt-act to make good an indictment of treason of compassing the king's death, which overt-act possibly of itself may be indifferent and unapplicable to such an intent." 1 Hale, History of the Pleas of the Crown (Evelyn ed., London, 1736), p. 115. And he noted that "if there be an assembling together to consider how they may kill the King, this assembling is an overt-act to make good an indictment of compassing the king's death." *Id.*, p. 119. Kelyng states the same view. He cites *Sir Everard Digby's Case*, 1 St. Tr. 234, for the proposition that the meeting of persons and their consulting to destroy the king was itself an overt act. "It was resolved that where a Person knowing of the Design does meet with them, and hear them discourse of their traitorous Designs, and say or act nothing: This is High-Treason in that Party, for it is more than a bare Concealment, which is Misprision because it sheweth his liking and approving of their Design." He says that if a person not knowing their intent met with them, heard their plans, but said nothing and never met again, that would be only misprision of treason. "But if he after meet with them again, and hear their Consultations, and then conceal it, this is High-Treason. For it sheweth a liking, and an approving

of their Design." Kelyng, A Report of Divers Cases in Pleas of the Crown (3d ed., London, 1873), p. *17. And see p. *21.

Foster is even more explicit. Like Coke he asserts that an overt act is required for each branch of treason covered by the Statute of Edward III. Foster, A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746 in the County of Surry, and of other Crown Cases (2d. ed., London 1791), pp. 207; 237. He makes clear that an overt act is required not to corroborate the proof of a traitorous intent but to show that the treasonable project has left the realm of thought and moved into the realm of action. As respects the offense of compassing the death of the king, he says that the indictment "must charge, that the defendant did traitorously compass and imagine &c. and then go on and charge the several overt-acts as the means employed by the defendant for executing his traitorous purposes. For the compassing is considered as the treason, the overt-acts as the means made use of to effectuate the intentions and imaginations of the heart." *Id.*, p. 194. He refers to *Crohagan's Case* (Cro. Car. 332) where the defendant said "I will kill the King of England, if I can come at him" and the indictment added that he came to England for that purpose. "The traitorous intention, proved by his words, converted an action, innocent in itself, into an overt act of treason." *Id.*, p. 202. And he also points out that "Overt-acts undoubtedly do discover the man's intentions; but, I conceive, they are not to be considered merely as evidence, but as the means made use of to effectuate the purposes of the heart." *Id.*, p. 203. And he adds, "Upon this principle words of advice or encouragement, and, above all, consultations for destroying the King, very properly come under the notion of means made use of for the purpose. But loose words not relative to facts are, at the worst, no more than bare indications of the malignity of the heart." *Id.*, p. 204. He follows Kelyng in saying that attendance at a meeting with previous notice of the design to plot the death of the king or a return to a meeting after knowledge is gained of its treasonable purpose is treason, though bare concealment would not be if the defendant met the conspirators "accidentally or upon some indifferent occasion". *Id.*, p. 195.

It is true that these observations related to the offense of compassing or imagining the death of the king. But Foster indicates that the same test applies to make out the offense of adherence to the king's enemies. He says, "The offense of inciting foreigners to invade the kingdom is a treason of signal enormity. In the lowest estimation of things and in all possible events, it is an

attempt, on the part of the offender, to render his country the seat of blood and desolation." *Id.*, pp. 196-197. This was said in connection with his discussion of *Lord Preston's* case, 12 How. St. Tr. 645, a landmark in the law of treason. Lord Preston was indicted both for compassing the death of the king and for adherence to his enemies. England was at war with France. The indictment alleged as an overt act of treason that on December 30, 1690, Lord Preston and others hired a small boat in the County of Middlesex to take them to another vessel which would carry them to France. The indictment alleged that the defendants were en route to France to communicate military information to the enemy. After the vessel set sail for France and when the vessel was in the County of Kent, the defendants were arrested. Papers containing information of value to the enemy were found on the person of Lord Preston's servant. Lord Preston contended that since the indictment laid the treason in Middlesex there was no showing that a legally sufficient overt act of treason had been committed in that county. The court held, however, that the act of boarding the boat in Middlesex was a sufficient overt act of treason. Lord Chief Justice Holt ruled, "Now the question is, whether your lordship had a design to go to France with these papers? If you had, and if your lordship did go on ship-board in order to it, your taking boat in Middlesex in order to go on ship-board, is a fact done in the county of Middlesex." 12 How. St. Tr., p. 728.

Foster in his analysis of that case makes clear that taking the boat was an overt act sufficient not only to the crime of compassing the death of the king but also adherence to the enemies of the king. Foster, *op. cit.*, pp. 197-198. Yet on its face and standing alone the overt act of taking the boat was completely innocent and harmless. Only when it was related to other activities and events did it acquire a treasonable significance. Foster gives other indications that in case of adherence to the enemy the function of the overt act is no different than when the offense of compassing is charged. The crime of adherence is made out where the defendant attempts to send money, provisions, or information to the enemy "though the money or intelligence should happen to be intercepted, for the party in sending did all he could; the treason was complete on his part, though it had not the effect he intended." *Id.*, p. 217.

Blackstone emphasizes the desirability of a restrictive interpretation of the offense of treason, condemning "constructive" treason and "newfangled treasons" which imperil the liberty of

the people. 4 Blackstone, Commentaries (6th ed. Dublin 1775), pp. 75, 83, 85, 86. Blackstone recognizes the distinction between evidence of intent and the overt act: "But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or *overt*, act. And yet the tyrant Dionysius is recorded to have executed a subject, barely for dreaming that he had killed him; which was held for a sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law: and therefore, in this, and the three next species of treason, it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon." *Id.*, p. 79. When it comes to the offense of adherence to the enemy he gives examples of adequate overt acts, some of which may be innocent standing by themselves. "This must likewise be provided by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like." *Id.*, pp. 82-83. His analysis supports the views of Foster that the function of the overt act is to show that the traitorous project has moved out of the realm of thought into the realm of action.

The English cases prior to 1790 support this thesis. We have mentioned *Lord Preston's case*. In the case of *Captain Vaughn*, 13 How. St. Tr. 485, the principal charge against the defendant was adhering to the enemy, though levying war was also alleged. The substance of the overt act of adherence was that when France and England were at war the defendant cruised in a small ship of war, in English waters, in the service of France with intent to take the king's ships. It was objected that the overt act alleged was insufficient "for it is said only he went a-cruising; whereas they ought to have alledged that he did commit some acts of hostility, and attempted to take some of the king's ships; for cruising alone cannot be an overt-act; for he might be cruising to secure the French merchant-ships from being taken, or for many other purposes, which will not be an overt-act of treason." p. 531. But Lord Chief Justice Holt ruled: "I beg your pardon. Suppose the French king, with forces, should come to Dunkirk with a design to invade England; if any one should send him victuals, or give him intelligence, or by any other way contribute to their assistance, it would be high-treason in adhering to the king's enemies." p. 531. And Lord Chief Justice Treby added: "The indictment is laid for adhering to, and comforting and aiding the king's enemies. You would take that to be capable to be construed

adhering to the king's enemies in other respects; but I take it to be a reasonable construction of the indictment, to be adhering to the king's enemies in their enmity. What is the duty of every subject? It is to fight with, subdue, and weaken the king's enemies: and contrary to this, if he confederate with, and strengthen the king's enemies, he expressly contradicts this duty of his allegiance, and is guilty of this treason; of adhering to them. But then you say here is no aiding unless there was something done, some act of hostility. Now here is going aboard with an intention to do such acts, and is not that comforting and aiding? Certainly it is. Is not the French king comforted and aided, when he has got so many English subjects to go a cruising upon our ships?" pp. 532-533. And he went on to say that acts which "give the enemy heart and courage to go on with the war" are acts of adherence even though the whole project was "an unprosperous attempt." p. 533. He emphasized that the lack of success was immaterial, for "if they have success enough, it will be too late to question them." p. 533. This is plain recognition not only that the aid and comfort may be given though the project is thwarted but also that aid and comfort is given when the enemy is encouraged and his morale bolstered as well as when materials are furnished.

The case of *Francis De la Motte*, 21 How. St. Tr. 687, is also somewhat illuminating. The indictment charged compassing and adhering. The overt acts included writing and causing to be written documents conveying intelligence to the enemy, procuring a messenger to carry the documents, and hiring a person to gather and to send the intelligence. Mr. Justice Buller in his charge to the jury said: "The sending intelligence, or collecting intelligence for the purpose of sending it to an enemy, to enable them to annoy us or to defend themselves, though it be never delivered to the enemy; or the hiring a person for that purpose, is an overt act of both the species of treason which I am stating to you from this indictment." p. 808.

These materials indicate that the function of the overt act was to make certain that before a conviction for the high crime of treason may be had more than a treasonable design must be established: it must be shown that action pursuant to that design has been taken. The treason of adherence was defined essentially in

[1] Accord: William Gregg, 14 How. St. Tr. 1371; Trial of Dr. Hensey, 19 How. St. Tr. 1341. Both of these involved indictments for compassing and adhering, the overt acts being letters of intelligence intercepted before they reached the enemy.

terms of conduct for it involved giving aid and comfort. Yet the attempt alone was sufficient; the aid and comfort need not have been received by the enemy. Conduct amounting to aid and comfort might be innocent by itself—such as collecting information or stepping into a boat. It was sufficient if in its setting it reflected a treasonable project. It need not entail material aid; comfort or encouragement was sufficient. The only requirement was that it definitely translate treasonable thought into action which plainly tended to give aid and comfort to the enemy.

These materials likewise support the contention of the government that the overt act need not manifest treason on its face.

The history of treason in this country down to the Constitution has been recently developed in Hurst, Treason in the United States, (1944) 58 Harv. L. Rev. 226. We do not stop to explore that field. But Professor Hurst's researches make plain that prior to the revolution the influence of 25 Edw. III was strong in the colonies and that, if anything, the scope of the offense was somewhat broadened. The Revolution changed matters. The Continental Congress recommended more restrictive legislation to the colonies which limited treason to levying war and adhering to the enemy, giving him aid and comfort. *Id.*, p. 247. No form of treason by compassing was retained. *Id.*, p. 252. Distrust of constructive treason was beginning to be voiced. (*Id.*, pp. 253, 254) though in some colonies treason was so broadly defined as to include mere utterances of opinions. *Id.*, pp. 266 *et seq.*

The proceedings of the Constitutional Convention of 1787 have been related in the opinion of the Court. And see Hurst, Treason in the United States, 58 Harv. L. Rev. 395. As the Court points out the Framers were anxious to guard against convictions of the innocent by perjury and to remove treason from the realm of domestic, political disputes. Franklin expressed concern on the first in his statement that "prosecutions for treason were generally virulent; and perjury too easily made use of against innocence." 2 Farrand, Records of the Federal Convention, p. 348. Madison and Jefferson[2] both expressed distrust of treason for its

[2] In a letter of April 24, 1792, Jefferson, then Secretary of State, wrote: "Treason, . . . when real, merits the highest punishment. But most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government* and acts against the *oppressions of the government*; the latter are virtues; yet they have furnished more victims to the executioner than the former; because real treasons are rare, oppressions frequent. The unsuccessful strugglers against tyranny, have been the chief martyrs of treason law in all countries." See 8 Writings of Thomas Jefferson (Library ed. Wash. 1903) p. 332

long history of abuse in the political field. Madison said in language somewhat reminiscent of Blackstone: "As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author." The Federalist, No. XLIII.

The requirement of two witnesses was not novel. England had long had that rule. 9 Holdsworth, A History of English Law (2d ed. 1938) p. 207. The novelty was in the requirement that there be two witnesses to the "same" overt act. Moreover, there was no novelty in the offenses which were included in the definition of treason. Adhering to the enemy, giving him aid and comfort, like levying war, had long been embraced in the English crime of treason as we have seen. But there was novelty in the narrow definition of treason which was adopted—a restrictive definition born of the fear of constructive treason and distrust of treason as a political instrument.

There is, however, no evidence whatever that the offense of adhering to the enemy giving him aid and comfort was designed to encompass a narrower field than that indicated by its accepted and settled meaning. Nor is there the slightest indication that the kind or character of overt acts required were any different than those which had long been recognized or accepted as adequate. The overt act was of course "intended as a distinct element of proof of the offense in addition to intent." Hurst, *op. cit.*, pp. 415-416. But any suggested difference from the body of law which preceded vanishes when two witnesses to the same overt act are produced. As respects the point vital for our decision it is therefore quite inaccurate for the Court to conclude that our treason clause "taught a concept that differed from all historical models." That would be true only if there was a purpose to depart from the concept of adhering to the enemy or the concept of overt acts which had become ingrained in the antecedent English law. We find no such purpose.